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International Law and the United States Role in Viet Nam: A Reply[†]

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In a recent issue of the *Yale Law Journal* Professor Richard Falk raises a number of questions about the lawfulness of the United States role in Viet Nam.¹ The importance of some of these questions for the direction of contemporary international law as well as for the appraisal of the United States role in Viet Nam calls for continuing dialogue.

In analyzing the United States role in Viet Nam, Professor Falk focuses on the problem of the international law of "internal war."² He indicates that "the central issue is whether an externally abetted internal war belongs in either of the traditional legal categories of war—'civil' or 'international.'"³ In answering this question and the sub-

† Prof. Moore's article is a response to the arguments made by Prof. Richard Falk in *International Law and the United States Role in the Viet Nam War*, 75 YALE L.J. 1122 (1966). Prof. Falk's response to this article appears *infra* at 1095. Limitations of time required that we give Prof. Falk the last word.—eds.

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1. Falk, *International Law and the United States Role in the Viet Nam War*, 75 YALE L.J. 1122 (1966).

A condensation of Professor Falk's views carries some risk of distortion. The reader is urged to consult Professor Falk's article before reading this reply.

My own views are elaborated and further documented in Moore, *The Lawfulness of Military Assistance to the Republic of Viet-Nam*, 61 AM. J. INT'L L. 1 (1967). Additional background documentation supporting this view may be found in Moore & Underwood, *The Lawfulness of United States Assistance to the Republic of Viet Nam*, 112 CONG. REC. 14,943 (daily ed. July 14, 1966), reprinted in 5 DUQUESNE L. REV. 235 (1967).

See also Alford, *The Legality of American Military Involvement in Viet Nam: A Broader Perspective*, 75 YALE L.J. 1109 (1966); Partan, *Legal Aspects of the Vietnam Conflict*, 46 B.U.L. REV. 281 (1966); Wright, *Legal Aspects of the Viet-Nam Situation*, 60 AM. J. INT'L L. 750 (1966).

2. Falk, *supra* note 1, at 1122.

3. *Id.*

sidiary questions it poses Falk constructs a framework focused on assistance in the context of civil strife. Analytically, as a tool for clarifying policy choices, he divides violent conflict into Type I conflict, involving "the direct and massive use of military force by one political entity across a frontier of another,"⁴ Type II conflict, involving "substantial military participation by one or more foreign nations in an internal struggle for control,"⁵ and Type III conflict, involving "internal struggle for control of a national society, the outcome of which is virtually independent of external participation."⁶ He postulates that while it is appropriate "to use force in self-defense"⁷ in Type I conflict, in Type II conflict it is only "appropriate . . . to take off-setting military action confined to the internal arena,"⁸ and in Type III conflict "it is inappropriate for a foreign nation to use military power to influence the outcome."⁹ Professor Falk then characterizes the Viet Nam conflict as Type III,¹⁰ but "if this position entailing non-participation is rejected,"¹¹ it follows, according to Falk's view, that international law prohibits United States participation in the Viet Nam conflict or at least limits the maximum response to Type II counter-intervention within the internal arena of South Viet Nam.¹²

Although his critique is both scholarly and creative, the framework proposed by Professor Falk is over-simplified for use in clarifying Viet Nam policy choices. His resulting conclusions about the illegality of the United States role in Viet Nam are unsound. The Viet Nam conflict is highly ambiguous and it begs the question to analyze it in a framework for "civil strife."¹³ Although generalization is a useful tool for decision, a generalization that the Viet Nam conflict is either Type II or Type III "civil strife" ignores features of the total context which are crucial in any assessment of long run community common interest. Viet Nam, while evidencing features of "civil strife," also evidences features of the divided nation problem and raises questions of per-

4. *Id.* 1126.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* 1127.

11. *Id.*

12. *Id.* Professor Falk seems to retreat from the non-participation argument when he later asserts: "International law offers no authoritative guidance as to the use of force within South Viet Nam, but the bombing of North Viet Nam appears to be . . . a violation of international law." *Id.* 1155.

13. Professor Falk begins to beg the question in his second sentence when he says: "A war is usefully classified as internal when violence takes places primarily within a single political entity, regardless of foreign support for the contending factions." *Id.* 1122.

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missible use of force across de facto boundaries and cease-fire lines. Analysis of the lawfulness of the United States role must consider this total context in the light of the major community policies at stake.

Real-World Viet Nam: An Ambiguous Context

Both sides in the Viet Nam debate characteristically select from the highly ambiguous context those features which reinforce their perceptions of the conflict. The "White Papers"¹⁴ issued by the State Department in 1961 and 1965 painted too one-sided a picture of the conflict in not recognizing the extent of indigenous support for the Viet Cong within South Viet Nam and in proclaiming a homespun view of the failure to implement the election provisions of the Geneva Accords. As a result, the White Paper model of "aggression from the North" has never captured the complex reality of the Viet Nam problem. But similarly, critics of Viet Nam policy have also engaged in this "model building." In characterizing the conflict as a "civil war" and the United States role as "intervention," they focus on the features of the context pointing to Vietnamese national unity, the ill-fated unity and election provisions in the Accords, and the instability of governments in the South. In building this "civil war-intervention" model critics characteristically do not focus on the very real ambiguities in the Geneva settlement, the more than twelve year territorial, political and ideological separation of the North and South, the existence of a cease-fire line dividing North and South, and the close relations between Hanoi and the Viet Cong. Professor Falk's model essentially reflects the critics' one-sided focus.¹⁵ As a result his first choice characterization of the conflict as "an internal struggle for control of a national society, the outcome of which is virtually independent of external participation [Type III conflict]," is misleading for purposes of evaluating the permissibility of United States assistance. The issues in Viet Nam are not nearly so neat and tidy and no amount of "model

14. U.S. DEP'T OF STATE, A THREAT TO THE PEACE: NORTH VIET-NAM'S EFFORT TO CONQUER SOUTH VIET-NAM (1961); U.S. DEP'T OF STATE, AGGRESSION FROM THE NORTH, THE RECORD OF NORTH VIET-NAM'S CAMPAIGN TO CONQUER SOUTH VIET-NAM (1965) (reprinted in 52 DEP'T STATE BULL. 404).

15. Professor Quincy Wright relies on a similar substantially one-sided fact selection in building a "model" of the conflict as civil strife between Hanoi and Saigon. See Wright, *supra* note 1, at 756-59.

It is somewhat uncertain whether Professor Falk's Type III characterization refers to "civil strife" within the South, "civil strife" between North and South, or both. Although he indicates that he regards "the war in South Vietnam primarily as a Type III conflict," much of the evidence which he relies on for this characterization seems to argue more for a North-South characterization. See Falk, *supra* note 1, at 1128-32. See also the North-South arguments, *id.* at 1138 and 1153 and notes 45, 48 and 67 *infra*.

building" will make them so. Real-world Viet Nam combines some elements of civil strife (both within the South and between North and South) with elements of the cold war divided nation problem and "aggression from the North," all complicated by an uncertain international settlement. Because of the complexity of this total context, neither the official nor critical models provides a sufficiently sensitive analytic tool for clarifying policy choices in the conflict. The starting point for selection of important contextual features must be analysis of the principal community values at stake.

A prominent feature of contemporary international law is the prohibition of coercion in international relations as a strategy of major change. The most widely accepted understanding of the requirements of both customary international law and the United Nations Charter is that force pursuant to the right of individual or collective defense or expressly authorized by the centralized peacekeeping machinery of the United Nations is lawful. Essentially all other major uses of force are unlawful.¹⁶ These norms reflect awareness both of the great destructiveness of war and of the necessity for the maintenance of defensive rights in a world divided between competing public order systems and with only limited expectations toward the success of existing centralized peace-keeping machinery. At a lower level of generality customary international law and the United Nations Charter outlaw major use of military force to redress grievances, however deeply felt, in the absence of major military attack on fundamental values such as political and territorial integrity. In the nuclear age it is usually better that international disputes not be settled than that they be settled by unilateral military strategies. And this is particularly true of disputes between the major contending public order systems, with their almost unlimited potential for escalation and destruction. These community norms also reflect the judgment, evident as well in national law, that when centralized peace-keeping machinery is not effectively available it is necessary to preserve the right of defense to those attacked. In a world in which power plays a large role in international affairs, this right of defense is a major source of control and sanction against aggression.¹⁷ As such, it may be crucial to conflict minimization that this defensive right be maintained.

16. See M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 121-260 (1961). See also McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959).

17. See generally H. HART, *THE CONCEPT OF LAW* 208-31 (1963); H. MORGENTHAU, *POLITICS AMONG NATIONS* 293-96 (3d ed. 1966).

In light of the critical values of world order at stake, conflict between contending governments of a nation at least *de facto* divided into continuing international entities and paying allegiance to contending public order systems presents a problem of major international concern. "Rational community policy must be directed to the coercive interactions of territorially organized communities of consequential size, whatever the 'lawfulness' of their origin."¹⁸ And this is particularly true of boundaries separating major contending public order systems. The balance of power makes the use of the military instrument across such boundaries particularly hazardous, as both Korea and Viet Nam have demonstrated. For the purposes of assessing the lawfulness of coercion across such boundaries and the lawfulness of extending assistance to the entity attacked, these real-world boundaries must be recognized as such. The label "civil strife" must not be allowed to obscure this major problem in conflict minimization. If we believe that long-run community common interest in minimization of coercion is against unilateral coercion across continuing *de facto* international boundaries and cease-fire lines, particularly when such boundaries separate the major cold war camps, then for purposes of policy clarification about the lawfulness of force, conflict between North and South Viet Nam is not "civil strife" regardless of other features of the context evidencing similarity with "civil strife." The ambiguous 1954 Geneva settlement certainly differentiates Viet Nam from the other divided nations of China, Germany and Korea, but the continuing and at least *de facto* division of Viet Nam has a substantial parallel to the cold war divided nation problem when analyzed with regard to the vital policies of minimum world public order. It is in the long run common interest not to permit change of existing and relatively permanent international divisions by unilateral military coercion however unjust the existence of the condition may seem to the protagonist of change. The Kashmir and Palestine disputes present additional contemporary examples of the importance of this principle.

As applied to Viet Nam, there is substantial evidence of the at least *de facto* separateness of North and South, regardless of one's view of the effect of the Geneva settlement. Thus, the State of Viet Nam (the predecessor government of South Viet Nam) and the Democratic Republic of Viet Nam (North Viet Nam) were to some extent separate *de facto* states even prior to the Accords of 1954,¹⁹ and subsequent to the Ac-

18. M. McDUGAL & F. FELICIANO, *supra* note 16, at 221 n.222.

19. For discussion on this point see Moore & Underwood, *supra* note 1, 112 CONG. REC. at 14,944.

cords their real separateness became much stronger. Prior to the Accords each government was recognized by a number of states as the government of Viet Nam and each carried on separate international activities.²⁰ Although nations had differing expectations from the Geneva settlement, the major effect of the settlement was to consolidate territorially the existing division of Viet Nam between the two rival governments. South Viet Nam is now recognized by about 60 nations and North Viet Nam by about 24, a recognition pattern closely approximating that of North and South Korea.²¹ The substantial expectations of the separateness of North and South Viet Nam after the Accords is indicated by the January, 1957 draft resolution of the U.S.S.R., a Co-Chairman of the Geneva Conference, calling for the simultaneous admission to the United Nations of North Viet Nam, South Viet Nam, North Korea and South Korea as four separate "states."²² Both North and South have clearly functioned for twelve years since the Accords as separate international entities with governmental institutions of their own operating along different ideological lines. Both have long maintained separate foreign embassies and diplomatic representation, and have administered separate territories and populations. That the contending governments claim sovereignty to all of Viet Nam can hardly be decisive for purposes of conflict minimization, as the situation is parallel in this respect to that in Korea, China and Germany. Under the circumstances, this at least de facto

20. The State of Viet Nam had been recognized by about 30 to 35 states prior to the Geneva settlement. See DOCUMENTS RELATING TO THE DISCUSSION OF KOREA AND INDO-CHINA AT THE GENEVA CONFERENCE (Misc. No. 16) CMD No. 9186 (1964); 31 PARL. SESSIONAL PAPERS 109, 133 (1953-54); U.S. DEP'T OF STATE, AMERICAN FOREIGN POLICY—CURRENT DOCUMENTS 121 n.3 (1958).

The Democratic Republic of Viet Nam had been recognized by the People's Republic of China, the Soviet Union and a number of East European Nations. See B. MURTI, VIETNAM DIVIDED 171 (1964). See also ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, SURVEY OF INTERNATIONAL AFFAIRS 1949-50 429-30 (1953).

21. See U.S. DEP'T OF STATE, LEGAL STATUS OF SOUTH VIET-NAM (4/31b-865BT). South Korea has full relations with about 64 nations while North Korea is recognized by about 25. *Id.*

22. See 11 U.N. GAOR Annexes, Agenda Item No. 25, at 5-7 U.N. Doc. A/SPC/L.9 (1957).

During the debates on this and other draft resolutions calling for the admission of the Republic of Viet Nam, the three Soviet delegates said between them:

[B]oth in Korea and in Viet-Nam two separate States existed, which differed from one another in political and economic structure. . . .

The fact was that there were two States in Korea and two States in Viet-Nam. . . .

The realistic approach was to admit that there were two States with conflicting political systems in both Korea and Viet-Nam. In the circumstances, the only possible solution was the simultaneous admission of the four countries constituting Korea and Viet-Nam. . . .

[T]wo completely separate and independent States had been established in each of those countries, [Korea and Viet Nam] with different political, social and economic systems.

11 U.N. GAOR Spec. Pol. Comm. 79, 81, 87, 101 (1957).

separation can not be ignored for meaningful clarification of policy alternatives.

In addition to the continuing real-world division of Viet Nam, a factor which exists as a crucial contextual feature regardless of any interpretation of the Geneva settlement, North and South are also divided by a military cease-fire line created by that settlement. In a Special Report in 1962 the International Commission for Supervision and Control in Viet Nam found that North Vietnamese military activity across that line was a specific violation of the Accords.²³ Some critics reply by pointing out that the Commission also found that South Viet Nam violated the Accords by accepting American defensive aid. But this neutral reporting proves little. The crucial question is whether these indicated breaches should be treated alike for purposes of community policy about maintenance of world public order. The clear answer is no. When put in context of community norms proscribing the use of force for settlement of disputes, the indicated breach of the North is exactly that kind of aggressive coercion proscribed, whereas the indicated breach of the South is permitted defensive response to such coercion. It is not at all anomalous in this context to assert that the norm, material breach of agreement justifies suspension of corresponding obligations, is available as a defense to the South but not the North.²⁴ For even if the South did breach the election provisions of the Accords, and there are serious questions here as to the legal position of the South with respect to these provisions of the Accords,²⁵ aggressive military strategies by the North are not a permitted response to such breach. The point is that there is a major difference in character of the indicated breaches North and South which is crucial for community policies of maintenance of minimum order and which is inherent in overriding community norms as to the lawfulness of the use of force. Failure to recognize this distinction is failure to grasp the essential community policies against unilateral coercive change embodied in the United Nations Charter. Rational community policy concerned with conflict minimization must be concerned with coercion across such international cease-fire lines. This is true regardless of the

23. SPECIAL REPORT TO THE CO-CHAIRMEN OF THE GENEVA CONFERENCE ON INDO-CHINA, CMD. NO. 1755 (1962); 39 PARL. SESSIONAL PAPERS 6-7 (1961-62).

24. Professor Falk fails to meet this point. In criticizing the State Department's "breach of agreement" argument he says: "One wonders why this 'international law principle' is not equally available to North Viet Nam after Saigon's refusal even to consult about holding elections. Why is Hanoi bound by the reasoning of footnote 10 and Washington entitled to the reasoning of reciprocal breach?" Falk, *supra* note 1, at 1154.

25. For discussion of these questions see Moore, *The Lawfulness of Military Assistance to the Republic of Viet Nam*, *supra* note 1.

merits of the dispute between North and South with respect to the Accords. Even if the underlying agreement created expectations denied by one of the participants, community policies against force as a strategy of change militate against resumption of hostilities. The existence of such an international cease-fire line in Viet Nam is another particular feature casting doubt on the utility of characterization of the conflict as an "internal struggle for control of a national society, the outcome of which is virtually independent of external participation."

It is one of the paradoxes of the Viet Nam dialogue that both sides rely on the 1954 Geneva settlement. In characterizing the Viet Nam conflict as a Type III conflict, Professor Falk relies heavily on a model of the Geneva settlement which he pictures as basically creating expectations of short run unification of Viet Nam under the government of Ho Chi Minh, although he admits "the intentions of the participants at Geneva were somewhat ambiguous."²⁶ The subsequent United States role in assisting the South, according to this model, "contrasts radically" with "the expectations created at Geneva."²⁷ There are factors in the manifold of events constituting the Geneva settlement that point to such a conclusion. Chief among them are Articles 6 and 7, the "no boundary" and "election" provisions of the Final Declaration. These provisions suggest that at least those participants agreeing to the Final Declaration expected that Viet Nam would be united by elections in 1956 and that the division was to be temporary. But the language of the Final Declaration is not the only source for ascertaining the genuine expectations of all the participants and in this case may be unreliable. There are at least equally important factors in the context of the Geneva settlement that cast serious doubt on the legiti-

26. Falk, *supra* note 1, at 1129. This theme runs all through Professor Falk's critique and constitutes one of his major assumptions. By way of some representative statements:

My own judgment, based on the analysis of the Geneva settlement in 1954, is that the war in South Viet Nam represents more an American attempt at "rollback" than a Communist attempt at "expansion." The Geneva Conference looked toward the reunification of the whole of Viet Nam under the leadership of Ho Chi Minh. The introduction into South Viet Nam of an American military presence thus appears as an effort to reverse these expectations and to deny Hanoi the full extent of its victory against the French. *Id.* 1125 n.15.

Hanoi was "entitled" to prevent Saigon from establishing itself as a political entity with independent claims to diplomatic status as a sovereign state. A separation of Viet Nam into two states was not contemplated by the participants at Geneva. *Id.* at 1130 n.31.

[T]he injection of an American political and military presence was, from the perspective of Hanoi, inconsistent with the whole spirit of Geneva. The United States decision to commit itself to maintaining a Western-oriented regime in South Viet Nam upset the expectations regarding the Southeast Asian balance of power . . . *Id.* 1138.

The strength of Hanoi's claim [to exercise control over the South] arises from . . . the expectations created at Geneva that the elections would confirm that military victory . . . *Id.* 1138 n.66.

27. *Id.* 1131.

macy of placing major reliance on alleged short run expectations of Hanoi with respect to unification of Viet Nam. These are factors to which Falk does not advert in constructing his model.

The memoirs of Anthony Eden²⁸ and the preliminary seven point program agreed to by the United States and the United Kingdom and apparently supported by French Prime Minister Mendes-France²⁹ strongly suggest that the real core of the settlement, at least from a Western standpoint, was partition of Viet Nam between the two major contending public order systems, a division to some extent shared by the Vietnamese people. In fact, Eden, the individual Chairman of the Conference, was a chief proponent of partition although Eisenhower indicated concern because of the loss of *the North* to "Communist enslavement."³⁰ Nowhere does Eden indicate that he felt he had failed to set up a permanent barrier between Ho Chi Minh and Malaya, one of his chief concerns.³¹ *The Survey of International Affairs 1954*, published by the British Royal Institute of International Affairs, has this account of the Viet Minh position at the Conference:

On 25 May the Viet Minh Foreign Minister, Mr. Dong, put forward a detailed plan, which was clearly in the nature of a first ap-

28. A. EDEN, *FULL CIRCLE* (1960). Eden writes that prior to the conference "it . . . seemed inevitable that large parts of the country would fall under Communist control, and the best hope of a lasting solution lay in some form of partition." *Id.* 117. And "I felt that the Chinese might yet be constrained to come to an arrangement which would . . . allow a free life to some part of Vietnam . . ." *Id.* 137. And "I decided to persevere at our next meeting [with Chou En-lai] with my plan for what I called the 'protective pad.' Many countries had an interest in this and, if I could once get the conception established, the position might hold, perhaps for years. . . . It would be best if communism could be . . . halted as far north as possible in Vietnam." *Id.* 138. And Eden writes that after the Conference "The Vietnamese had saved more of their country than had at one time seemed possible. . . . In the months ahead the United States would be playing a greater part in all their [Viet Nam, Cambodia and Laos] destinies." *Id.* 160-61. See also *id.* 97, 101-02, 148-49, 156-57.

29. See *id.* 149, 156-57. Under the terms of this program the United States and the United Kingdom agreed "to respect an armistice agreement on Indo-China which:

. . .

2. Preserves at least the southern half of Vietnam, and if possible an enclave in the delta

3. Does not impose on . . . retained Vietnam any restrictions materially impairing . . . [its] capacity to maintain [a] stable non-Communist regime

4. Does not contain political provisions which would risk loss of the retained area to Communist control. . . .

Id. 149. According to Eden, M. Mendes-France supported this program. Eden writes that Mendes-France "described to us his negotiations with the Vietminh on the question of the demarcation line in Vietnam and effectively demonstrated that at no point had his position diverged from the minimum terms which had been defined by the Americans and ourselves." *Id.* 156.

30. "To me these French proposals . . . implied nothing else but partition. We knew, from experience in Korea, that this would probably lead to Communist enslavement of millions in the northern partitioned area." D. EISENHOWER, *MANDATE FOR CHANCE* 432 (Signet ed. 1963).

31. A. EDEN, *FULL CIRCLE* 97 (1960).

proximation to the "accepting price" of the insurgents This plan was, clearly, rather more than a proposal for a regroupment of forces; if put into effect it would in fact provide something like a *de facto* military partition of the country, and one that, with its provision that the two areas chosen should be economically viable, seemed to be envisaged as lasting for some time.³²

The public record indicates that the South Vietnamese government opposed partition and supported provisional control by the United Nations of all of Viet Nam pending free elections.³³ Their refusal to agree to the political provisions of the settlement is consistent with expectations on their part that those provisions would be unworkable from their standpoint and that the agreement would actually result in *de facto* partition. Moreover, France had entered into a series of independence agreements with the State of Viet Nam, the predecessor government of South Viet Nam, prior to the conclusion of the Indo-China phase of the Geneva Conference³⁴ and French Foreign Minister Bidault indicated at the Conference that the State of Viet Nam was independent and that it was "fully and solely competent to commit Viet Nam."³⁵ Both the separate presence of the State of Viet Nam and these statements of the French delegate at the Conference suggest that

32. ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, SURVEY OF INTERNATIONAL AFFAIRS 1954-48 (1957). And see DO VANG LY, AGGRESSIONS BY CHINA 151 (2d ed. 1960).

The actual proposal made by the Vietminh Chief Delegate, Mr. Dong, on May 24 was:

The readjustment is made on the basis of an *exchange of territory*, the following elements to be taken into consideration: area, population, political and economic interests so as to accord each party *zones all of a piece*, relatively widespread and offering facilities for economic activities and administrative control respectively within each zone. The demarcation line between these zones should as much as possible not create communication and transport difficulties within the respective zones.

Ngo Ton Dat, The Geneva Partition of Vietnam and the Question of Reunification During the First Two Years 163 (1963) (unpublished Ph.D. dissertation, Cornell Univ.). The author accompanied the Vietnamese Prime Minister to the Geneva negotiations. He sums up this Vietminh proposal as: "Clearly Mr. Dong's declaration could only mean one thing: the partition of Vietnam." *Id.*

33. See "The News In Review," *United Nations Review* 2 (Vol. 1, July 1954). Moore & Underwood, *supra* note 1, 112 CONG. REC. at 14981 n.267.

34. See Moore & Underwood, *supra* note 1, 112 CONG. REC. 14,969-70 nn.22, 23, 33, 36, 41. Like most of the context surrounding the Conference, these agreements were ambiguous and seem not in fact to have effectuated complete independence to the State of Viet Nam prior to the conclusion of the Conference. But taken together these agreements did provide some status to the State of Viet Nam as an international entity in its own right. For a restrictive interpretation of the effect of the agreement initiated on June 4, 1954 see Weinstein, Vietnam's Unheld Elections 12-14 (1966) (Data Paper No. 60, Southeast Asia Program, Cornell Univ.).

Ngo Ton Dat seems to conclude that the State of Viet Nam was not bound by the Accords since the Commander-in-Chief of the French Union Forces did not have a sufficient delegation of power from the State of Viet Nam to conclude a "general armistice of vital importance." See Ngo Ton Dat, *supra* note 32, at 303-10.

35. DOCUMENTS RELATING TO THE DISCUSSION OF KOREA AND INDO-CHINA AT THE GENEVA CONFERENCE (Misc. No. 16) CMD. NO. 9186 (1954); 31 PARL. SESSIONAL PAPERS 108-09, 132-34 (1953-54).

France did not intend to bind the State of Viet Nam by the political provisions of the Final Declaration. In the face of this French position at the Conference and the clear refusal of the State of Viet Nam to adhere to the political provisions of the agreements,³⁶ the experienced diplomats at the Conference must have been aware of the possibility that few provisions other than cease-fire and partition would be carried out.³⁷ In this regard it is significant that even prior to the Conference the State of Viet Nam was recognized by about thirty states and had been endorsed by the General Assembly of the United Nations as a state qualified for membership.³⁸ Professor Falk himself somewhat inconsistently points out that "at the time of the Geneva proceedings, the Saigon regime exerted control over certain areas in the South, and this awkward fact made it unrealistic to suppose that the Geneva terms of settlement would ever be voluntarily carried out."³⁹

Some of the terms of the settlement and the fact that the Final Declaration of the Conference which contained the political settlement provisions was unsigned also suggest that the real settlement was partition or at least that the parties were never really agreed on much but a territorial division and cease-fire. The key to unification would clearly be the election provisions, which were surprisingly vague for so important a question. The only reference to elections in the signed Agreement on the Cessation of Hostilities appears in Article 14(a) and reads in full: "Pending the general elections which will bring about the unification of Viet Nam" The *unsigned* Final Declaration of the Conference adverts to the election problem only in the three sentences of paragraph seven.⁴⁰ The first two sentences are unclear and add little

36. See COUNCIL ON FOREIGN RELATIONS, THE UNITED STATES IN WORLD AFFAIRS 1954 252-53 (1956).

37. According to P. J. Honey of the University of London: In signing the agreements they [the Vietnamese Communists] were forced to bow to strong Soviet pressure, a fact that robbed them of much prestige at home, and the only face-saving concession made to them was the unsigned "Declaration of Intention," which prescribed national elections for the reunification of Vietnam, to be held not later than July 1956. The worthlessness of this concession can be seen in a remark made by the Communist North Vietnam (DRV) Prime Minister, Pham Van Dong, to one of my Vietnamese friends immediately after the signing of the agreements. When asked which side he thought would win the elections, Dong replied, "You know as well as I do that there won't be any elections."

P. HONEY, COMMUNISM IN NORTH VIETNAM: ITS ROLE IN THE SINO-SOVIET DISPUTE 5-6 (1966). See also *id.* 67. But see Weinstein, *supra* note 34, at 17-18 n.71.

38. 7 U.N. GAOR Annexes, Agenda Item No. 19, at 10, U.N. Doc. A/2341 & Corr. 1 (1952); 7 U.N. GAOR 410 (1952).

39. Falk, *supra* note 1, at 1152. He also writes: "In a sense it was naive of Hanoi to accept the Geneva arrangement or to rely upon its implementation." *Id.*

40. See FURTHER DOCUMENTS RELATING TO THE DISCUSSION OF INDO-CHINA AT THE GENEVA CONFERENCE (Misc. No. 20) CMD. No. 9239 (1954); 31 PARL. SESSIONAL PAPERS 9-11 (1953-54); 161 BRITISH & FOREIGN STATE PAPERS 359-61 (1954).

beyond a date for elections and the general composition of a supervisory commission, and the third sentence leaves the monumental problems to be solved by future consultations between the "representative authorities of the two zones . . .," one of which was already publicly declaring that it would refuse to be bound by these provisions. This cavalier treatment of the political settlement must be considered a major weakness of the settlement and suggests that the parties were aware of the possibility of an extended partition in Viet Nam. In contrast, the *signed* military cease-fire agreement dealt in great detail with provisions for a continuing cease-fire, and the central feature of the settlement was the division of Viet Nam between two essentially economically viable and at least de facto international entities. The major real impact of the settlement was to stop the fighting and to reinforce an already existing political division. The provisions for allowing initial transfer of civilians between zones⁴¹ also suggest continuing partition and are difficult to reconcile with genuine expectations of short run unification by election. In large part they reflected Western concern about loss of *the North* to Communism and a desire to enable non-Communists in the North to opt for a non-communist system in the South. Victor Bator makes much the same point with respect to the ambiguities of the settlement. According to Bator:

The contradictions and the equivocations in the documents that emerged from the Geneva Conference gain added emphasis by the procedure by which they were reached. As narrated in memoirs such as those of Anthony Eden, who presided at Geneva, or in the detailed accounts of Bernard B. Fall, Jean Lacouture, and Philippe Devillers, partition—so ambiguously treated in the documents—was the most important subject of bargaining, both in principle and in its geographical application. It was discussed continually, if confidentially within each delegation, but for a time was carefully ignored when the delegations met.

When at last partition was openly breached by the Vietminh, the French and British were elated. From that moment the location of the dividing line became the principal hurdle blocking the road to a settlement. Secretary of State Dulles, in order to underscore his insistence that it be drawn on the 17th parallel and to demonstrate western unity on this point, flew from Washington to Paris to meet with Eden and Premier Pierre Mendes-France. There were discussions even about the viability of the two parts. It is hard to believe that all this activity could have been devoted

41. See Article 14(d) of the Agreement on the Cessation of Hostilities in Viet Nam, July 20, 1954, and Article 8 of the Final Declaration of the Geneva Conference, July 21, 1954, in SENATE FOREIGN RELATIONS COMM., 89TH CONG. 1ST SESS., BACKGROUND INFORMATION RELATING TO SOUTHEAST ASIA AND VIETNAM 32, 59 (rev. ed. June 16, 1965).

to the location of a temporary military demarcation line, a kind of billeting arrangement that would shortly disappear. The innocent-sounding text of the final agreement must have signified something of greater import.⁴²

There is also evidence in the ambiguous context surrounding the Conference which points to the conclusion that Hanoi placed reliance on elections being held in 1956.⁴³ A review of the negotiations at Geneva,

42. Bator, *Geneva, 1954: The Broken Mold*, THE REPORTER, June 30, 1966, at 15, 17. Bator also writes:

The primary motivation of the Vietminh was to consolidate their rule somewhere, anywhere, in Vietnam. To accomplish this, Ho Chi Minh was willing to make political concessions from his militarily superior position. So it came about that, on May 25, the head of the Vietminh delegation first mentioned partition. It was to be based on a regrouping of forces on either side of a line of demarcation that would give both parties an area with a sufficiently large population to exist independently.

Id. at 17. See also B. FALL, VIET-NAM WITNESS 75-76, 123 (1966); DOCUMENTS RELATING TO THE DISCUSSION OF KOREA AND INDO-CHINA AT THE GENEVA CONFERENCE (Misc. No. 16) CMD. No. 9186 (1954) (record of Conference discussions); FURTHER DOCUMENTS RELATING TO THE DISCUSSION OF INDO-CHINA AT THE GENEVA CONFERENCE (Misc. No. 20) CMD. No. 9239 (1954); 31 PARL. SESSIONAL PAPERS (1953-54).

Lacouture candidly points out:

A great deal of confusion surrounds this Geneva settlement. It must be emphasized that the only texts signed at Geneva were the armistice agreements between the French and the Vietminh. No one at all signed the "final declaration" of the conference—both the United States and South Vietnam had reservations about it—and it carried only the force of suggestion. But apart from the North Vietnamese, the French were the only nation that formally guaranteed to carry out the Geneva accords that provided both for partition at the 17th parallel and for elections.

Lacouture, *Vietnam: The Lessons of War, Hearings on S. 2793 Before the Senate Comm. on Foreign Relations*, 89th Cong., 2d Sess., pt. 1, at 655, 656-57 (1966).

Ellen Hammer says of the political settlement provisions of the "Accords":

[a]lthough the Franco-Vietminh war was ended at Geneva in July 1954, a political solution for Vietnam was postponed to some unspecified future date.

The agreements outlined at Geneva . . . contained few if any provisions for their long-term execution. They were a series of desires for the future, drawn up by the conference participants.

E. HAMMER, VIETNAM YESTERDAY AND TODAY 247 (1966).

43. See Weinstein, *supra* note 34. See also G. KAHN & J. LEWIS, THE UNITED STATES IN VIETNAM 43-65 (1967).

These scholars argue that Hanoi placed major reliance on the election provisions and assert a model of the Geneva settlement which de-emphasizes the ambiguities in the political settlement. Interestingly, Kahn and Lewis point out that Dulles indicated in his press statement shortly after the Conference that now the United States could build up "the truly independent states of Cambodia, Laos and southern Vietnam." *Id.* 61. They concluded that SEATO "signalled the American intent to underwrite a separate state in southern Vietnam if, despite the inadmissibility of this under the Geneva Agreements, one could be established." *Id.* 63. The authors, however, fail to draw the inference that the immediate inclusion of "the free territory under the jurisdiction of the State of Vietnam" within the protection of Article IV of the SEATO Treaty, strongly indicated Western expectations that the Geneva settlement would lead to a non-communist South Viet Nam. It should be recalled that Britain and France were also parties to SEATO.

Jean Lacouture points out that Mendes-France addressed a letter to the Saigon leaders the day after the Geneva negotiations "assuring them that France would not recognize another trustee of Vietnam's sovereignty" and ending "any chance of political co-operation between Paris and Hanoi." He refers to this letter and the signing of the SEATO Treaty on the day after Geneva as the two shadows quickly darkening the Geneva Agreement. These and subsequent actions of the British, French, Soviet and United States governments support an interpretation that partition was the core of the agreements. See J. LACOUTURE, VIETNAM: BETWEEN TWO TRUCES 11-12 (Vintage ed. 1966).

however, suggests that the core of the settlement was the partition and cease-fire and that the major agreement came when both sides accepted partition as the basis for settlement. There was substantially less agreement on the political settlement provisions and at least the British, American and State of Viet Nam governments were opposed to these provisions, which they feared would work in practice to jeopardize maintenance of a non-communist South. The State of Viet Nam and the United States indicated to the Conference participants that they would not consider themselves bound by these provisions. In light of the major feature of the settlement—a *de facto* division between two contending governments—and the expressed negative attitudes toward the political settlement provisions by other major participants at the Conference, there is serious doubt about the reasonableness of placing great reliance on the election provision.

The totality of evidence suggests that the Western nations, particularly the United States and Britain, desired that the settlement would lead to a non-communist South and expected that it had some chance of doing so, that the Vietminh desired that the settlement would lead to unification under Northern control and may have expected that takeover by political settlement or military activities would be feasible if the regime in the South proved nonviable, and that the Diem government expected that the agreement would lead to *de facto* partition because the election provisions were unacceptable to them. Fair interpretation of the settlement should take into account not only asserted expectations of the North, but also the contrary expectations of the United States and the State of Viet Nam *at the time of the settlement* which were communicated to all participants.

The later Soviet lack of concern toward the non-implementation of the political settlement provisions and the Soviet attempt to admit both North and South Viet Nam to the United Nations reinforces the substantial evidence that partition was the core of the settlement.

The point is that there seem to have been only minimal shared expectations on the *political* settlement, and that because of this ambiguity it is particularly unreasonable to assert the "Accords" as a justification for North Vietnamese military activities when *de facto* partition did result.⁴⁴

When viewed in context there is considerable doubt as to the completeness of the model of the Geneva settlement relied on by Professor

44. For a detailed treatment of the background of the Conference and the negotiations leading up to the settlement, see Ngo Ton Dat, *supra* note 32.

Falk in characterizing the conflict as Type III. It seems implicit in much of his argument for this characterization that North and South are one international entity.⁴⁵ But the total manifold of events surrounding the settlement suggests that partition was the real core of the settlement. And there can be little doubt that in its total context the political settlement was highly ambiguous. This very ambiguity reinforces the danger to world order inherent in the North attempting to force its asserted expectations by use of the military instrument.

It is perhaps not unimportant that the continuing division of Viet Nam between governments of conflicting ideologies significantly reflects a traumatic split among the Vietnamese people as well as between East and West. The 1954 settlement and continued division have provided an opportunity for the Vietnamese people to choose systems, an opportunity principally taken advantage of by a flood of refugees from North to South.⁴⁶ Under the circumstances it is difficult to see the inequity in treating the two divisions as entities whose peo-

45. Although Professor Falk's Type III characterization is in his terms a characterization of "the war in South Vietnam," most of the considerations listed by him as leading him to so regard the conflict, such as Ho Chi Minh's asserted expectations from the Geneva settlement, asserted United States neglect of opportunities to negotiate with Hanoi, and the economic strain on Hanoi when relations between the North and South were not normalized, seem implicitly to argue that the conflict is a Type III conflict between the North and South. This suggestion that Falk is in effect substantially arguing that the conflict is civil strife between North and South is reinforced by the notable lack in his stated considerations of any analysis of the degree of independence of the Viet Cong.

In the absence of any real analysis of the relationship between Hanoi and the Viet Cong, particularly of the important questions of extent of military interaction prior to the first substantial increase in United States forces in late 1961, and prior to the commencement of regular bombing of the North in February, 1965, Falk's characterization of the conflict as Type III within South Viet Nam is unconvincing. In fact, most of the considerations which he relies on seem to indicate on their face that Hanoi's role is a major one in the total picture. See Falk, *supra* note 1, at 1127-32, 1137-38, 1151-52, 1158. See *infra* notes 48, 67.

46. According to the *Fourth Interim Report* of the International Control Commission, by July 20, 1955, 892,876 had moved from the North to the South and only 4,269 had moved from the South to the North under Article 14(d). *FOURTH INTERIM REPORT OF THE INTERNATIONAL COMMISSION FOR SUPERVISION AND CONTROL IN VIETNAM* (Vietnam No. 3) CMD. No. 9654 (1955); 45 PARL. SESSIONAL PAPERS 30, App. IV (1955-56).

These figures seem incomplete but the ratio of civilians going South to those going North probably remained about 10 to 1. This ratio resulted despite what one scholar has termed the "co-ordinated campaign of obstruction instituted by the authorities of the Democratic Republic of Vietnam against persons wishing to move to the south." Dai, *Canada's Role in the International Commission for Supervision and Control in Vietnam*, 4 CAN. YB. INT'L L. 161, 168 (1966).

According to Anthony Eden, "There were some indications of a greater willingness in Vietnam to face partition. There was no love lost between north and south. We felt that the distress at amputation might prove more apparent than real." A. EDEN, *FULL CIRCLE* 101 (1960).

P. J. Honey writes:

[A]ntagonism of long standing exists between the peoples of North and South Vietnam. The halves were divided for roughly two hundred years between the end of the sixteenth and the end of the eighteenth centuries—the dividing line was remarkably close to the present one—and a state of war existed between them.

P. HONEY, *supra* note 37, at 18.

ples are entitled to freely express their own preferences in regard to governmental institutions and unification. The conclusion "civil strife" obscures serious inquiry about this question of which territorially organized communities in Viet Nam ought to have their own right to self-determination today. Harrison Salisbury's *New York Times* reports on the relation between the N.L.F. and Hanoi indicate that even North Viet Nam concedes, at least publicly, 'some right to short run southern self-determination'.⁴⁷ The seriousness with which the South Vietnamese Constituent Assembly functions is an indication of the substantiality of these expectations within the South. The continuing territorial separation of North and South, compounded by the ideological split among the Vietnamese people, has understandably given rise to significant expectations of individualized self-determination in the North and South. Under these circumstances it is at least as reasonable to regard both North and South as entities whose peoples are now entitled to their own self-determination about political institutions and unification as to view North and South as one entity for these purposes.⁴⁸

47. See N.Y. Times, Jan. 16, 1967, at 1, col. 1.

Brian Crozier points out that:

[T]he circumstances of the Vietnamese drive to the south, the distance between Saigon and Hanoi, and the difficulty of pre-air age communications have all fostered separatist sentiment in the south. For about 200 years, until the close of the eighteenth century, Vietnam was divided into mutually hostile halves roughly coinciding with the present division. This, too, colours the view that the current troubles are just another civil war.

B. CROZIER, *SOUTHEAST ASIA IN TURMOIL* 135 (Pelican rev. ed. 1966).

At least one Vietnamese observer wrote in 1963: "South Vietnam has a large anti-Communist majority. And if the people of South Vietnam can really cast a free vote, it is a foregone conclusion that the Vietnamese nationals will win." Ngo Ton Dat, *supra* note 32, at 385.

48. Although the evidence on which Professor Falk relies to characterize the conflict as Type III seems to argue implicitly for characterization as Type III between North and South, he somewhat inconsistently places major reliance on characterization as Type III within South Viet Nam. But the evidence as related at pp. 1070-73 *infra*, simply does not support characterization of the conflict as Type III within South Viet Nam. For even if the insurgency in the South was initially an indigenous reaction to the oppressive measures of the Diem government, a proposition on which scholars differ, compare D. PIKE, *VIET CONG* 53, 80, 321 (1966) with G. KAHIN & J. LEWIS, *supra* note 43, at 119, and B. FALL, *VIET NAM WITNESS* 130-32 (1966), the evidence indicates that the Viet Cong were receiving assistance from Hanoi prior to the first significant increase in United States forces over pre-insurgency levels. As is evident in the writings of such Viet Nam scholars as Crozier, Fall, Lacouture, Pike, Schlesinger and Warner, there is general agreement that by 1961 Hanoi had entered the war and was assisting the Viet Cong. See note 67 *infra*. Pike indicates that by conservative estimate about 1,900 NLF cadres infiltrated from the North in the period from 1954 through 1960 and that in 1961, 3,700 more entered the South. But there is also general agreement that prior to 1961 the United States had only a very limited Military Assistance Advisory Group in South Viet Nam—probably not more than about 800-900, and that the first substantial increase in United States forces began in late 1961 with the rapid buildup of military advisory personnel, as recommended by the Taylor-Rostow report. Kahin and Lewis indicate that the major increase in United States assistance over pre-insurgency levels took place in early 1962. See G. KAHIN & J. LEWIS, *supra* note 43, at 77-78, 137. Apparently it was also in late 1961 and early 1962

Armed Attack and Defensive Response

Professor Falk argues alternatively that at most Viet Nam is a Type II conflict involving "substantial military participation by one or more foreign nations in an internal struggle for control."⁴⁹ In this alternative characterization of the conflict he is apparently focusing the conflict as "civil strife" within the South substantially assisted by northern military participation, rather than as "civil strife" between North and South. If, of course, North and South Viet Nam could be treated as one nation for the purpose of characterizing the conflict as "civil strife," it would be inconsistent to contend that the bombing of the North is an impermissible attack on a separate assisting state. Apparently focusing on "civil strife" within the South, then, Falk contends that "the United States could legitimately give military assistance to Saigon, but is obligated to limit the arena of violence to the territory of South Viet Nam."⁵⁰ He argues that it is impermissible to treat North Vietnamese assistance to the insurgents in the South as an armed attack justifying a defensive response against the North.⁵¹ This analysis disarmingly fails to separate the relevant intellectual task of description of past trends in decision from that of appraisal of alternatives. Although the is and the ought are both component elements of "law," intellectual clarification requires that the scholar differentiate widespread community expectations about law (whether of the is or the ought and whether evidenced by the practices of states or the writings of publicists, etc.) from his own personal policy recommendations. But though Professor Falk argues as policy recommendation that it *ought* to be the law, he cites no authority for his thesis that in what he calls a Type II conflict it is appropriate to take off-setting military action only if confined to the internal arena.

that the United States first began direct military support with the use of helicopter units to ferry Vietnamese troops into combat. The testimony of Secretary of State Dean Rusk before the Senate Foreign Relations Committee that the first United States military casualty in South Viet Nam occurred in December, 1961, is indicative of the relatively small military role played by the United States prior to late 1961. *THE VIET NAM HEARINGS* 263 (Vintage ed. 1966). A juxtaposition in time sequence of assistance rendered by both sides indicates that the United States did not significantly expand its assistance over pre-insurgency levels prior to the critical impetus given the conflict by Hanoi's increasing assistance and direction. The increase in United States forces was a *response* to the quickening pace of the war and the increasing assistance from Hanoi. To characterize the conflict as Type III within the South for the purpose of asserting the illegality of this offsetting United States response at a time when the Viet Cong were clearly receiving increasing assistance from Hanoi is meaningless.

49. Falk, *supra* note 1, at 1126, 1127, 1132.

50. *Id.* 1132.

51. See *id.* 1136, 1140, 1150-51. This argument is crucial to Professor Falk's thesis. He writes: "South Viet Nam would have had the right to act in self-defense if an armed attack had occurred, and the United States would then have had the right to act in collective self-defense." *Id.* 1140.

In the absence of substantial authority, his conclusion that the bombing of the North "*appears to be . . . a violation of international law*"⁵² (emphasis added) is somewhat mysterious, particularly since he elsewhere qualifies this thesis by a footnote reference that this "assertion . . . must be qualified to the extent that the United States decision to bomb North Viet Nam is treated as a law-creating precedent. . . ."⁵³ Candor requires acknowledgment that just as the problem of external assistance to the internal arena is unclear there are no "authoritative" rules of international law prohibiting the bombing of the North. Moreover, although international law may have great gaps in this area, in the context of Viet Nam there is greater reason to believe both as a matter of the is and the ought that the bombing of the North is a permissible defensive response.

There are two principal issues with respect to the legitimacy of defensive response against externally initiated or assisted insurgency. First, the question of whether off-setting assistance within the internal arena is legitimate and second, whether response against the territory of the assisting entity is legitimate. As Falk's proposed restriction of the armed attack test indicates, the armed attack inquiry is principally responsive to the second of these. It may be that assistance may be provided to the government forces in order to off-set external military assistance provided to the insurgents even in the absence of an armed attack as long as such assistance is confined to the internal arena. This distinction seems implicit in Falk's conclusion for Type II conflicts. It would mean that the United States could provide off-setting assistance to South Viet Nam even in the absence of an armed attack and that the question of whether there has been an armed attack is only relevant with respect to interdictive attacks against the North. But if this is the principal relevance of the armed attack test to the "internal war" situation then existing authority about armed attack suggests that defensive response against the North is permissive. Professor Kelsen suggests that this is the rule when he says:

Since the Charter of the United Nations does not define the term "armed attack" used in article 51, the members of the United Nations in exercising their right of individual or collective self-defense may interpret "armed attack" to mean not only an action

52. *Id.* 1155.

53. *Id.* 1123 n.5. Although Professor Falk concludes that "international law offers no authoritative guidance as to the use of force *within* South Viet Nam," strangely he does not seem to find even equal uncertainty with respect to his thesis that in Type II conflict it is appropriate to take offsetting military action only if confined to the internal arena. *See id.* 1155.

in which a state uses its own armed force but also a revolutionary movement which takes place in one state but which is initiated or supported by another state.⁵⁴

And Professor Brownlie supports this interpretation that there need not be a "direct invasion" to constitute an armed attack.⁵⁵

For reasons of national interest or strategy inherent in the balance of power, states may choose only rarely to reply against the territory of an entity assisting insurgents, as the Spanish Civil War demonstrated.⁵⁶ Moreover, if the assistance to insurgents is not militarily substantial (and that is frequently the case) it may not amount to an armed attack. But there is nothing inherent in the armed attack test which restricts this right of response to instances of overt invasion. Yet that would be substantially the consequence of Professor Falk's proposal.

The purpose of the armed attack requirement in Article 51 of the United Nations Charter is to restrict the right to use force in individual or collective defense to very serious situations in which there is no reasonable alternative to the use of force for the protection of major values. By such requirements, contemporary international law expresses the judgment that minor encroachments on sovereignty, political disputes, frontier incidents, the use of non-coercive strategies of interference, and generally minor aggression which does not threaten fundamental values such as political and territorial integrity, may not be defended against by major resort to force against another entity. These tests are simply representative of the community interest in restricting intense responding coercion to those situations where fundamental values are seriously threatened by coercion.⁵⁷ Such coercive

54. Kelsen, *Collective Security Under International Law*, 49 INT'L LAW STUDIES 88 (1956). Kelsen also points out that "Participation of a state, with its armed forces, in the civil war within another state on the side of the insurgents is certainly international war in the relationship between the two states concerned." H. Kelsen, *RECENT TRENDS IN THE LAW OF THE UNITED NATIONS* 935 (1951). See also H. Kelsen, *THE LAW OF THE UNITED NATIONS* 798 (1950).

55. I. BROWNIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 373 (1963). Brownlie clearly seems to assume that foreign assistance to insurgents can constitute an "armed attack." *Id.* at 327. He seems to adopt an "agency and control" test for armed attack in the civil strife context. *Id.* at 370-73. Although he adverts to the desirability of confining defensive measures to the territory of the defending state, his discussion does not rule out response against the territory of an assisting state in the face of a major threat. *Id.* at 327, 372-73.

56. See generally N. PADELFORD, *INTERNATIONAL LAW AND DIPLOMACY IN THE SPANISH CIVIL STRIFE* (1939). Cf. A. THOMAS & A. THOMAS, *NON-INTERVENTION* 225 (1956):

Such recognition, [German and Italian recognition of the insurgents as the legitimate government] being premature, was an illegal intervention and following it the Spanish war was converted from a civil war to an international war, and it should then have been treated as such. To apply the rules of international law devised to deal with insurgency to an international war is a great misuse of the law.

57. See M. McDUGAL & E. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 259 (1961).

threats to fundamental values can be effectuated as realistically by covert invasion and significant military assistance to insurgents as by armies on the march.

In the Viet Nam context the evidence strongly suggests that Hanoi provided significant military leadership and assistance to the Viet Cong from about 1959-60, an assistance which has greatly increased since then. Bernard Fall's account of the beginning of the Second Indo-China war in *The Two Viet-Nams*⁵⁸ suggests that the insurgency was substantially under the control of the Communist party apparatus even in the early years and that the National Liberation Front was substantially interrelated with Hanoi. By way of some relevant observations by Fall, certainly a qualified observer:

A last rationale for the autonomous rise of a resistance movement in South Viet-Nam, advanced notably by the French writer Philippe Devillers, is that "the insurrection existed before the Communists decided to take part, and that they were simply forced to join in" by Diem's oppressive measures. Devillers, however, advances no evidence to the effect that the movement was not taken in hand by Hanoi *later*, precisely because it had a popular character, and thus was useful.⁵⁹

The wholly artificial character of the National Liberation Front, at least during the first year of its operation, is perhaps best shown by the fact that until April 13, 1962, it had not disclosed the names of its alleged leaders . . .⁶⁰

In order to promote the concept that the Front and the Lao-Dong Party were separate entities, Hanoi informed the world on January 20, 1962, that a "conference of representatives of Marxists-Leninists in South Viet-Nam" had taken place on December 19, 1961, in the course of which it was decided to set up the Viet-Nam People's Revolutionary Party (Dang Nhan-Dan Cach Mang), which officially came into existence on January 1, 1962. . . .

[L]ike the National Liberation Front itself, the Revolutionary Party failed to announce the names of any of its founding members. According to two circulars emanating from the Lao-Dong authorities and infiltrated into South Viet-Nam, members of the Lao-Dong were notified as early as December 7, 1961 (twelve days before the founding meeting) that the new party was created merely out of tactical necessity but would remain under the overall control of the Lao-Dong. . . .

In all likelihood, the establishment of a "separate" Communist organization for South Viet-Nam follows the same pattern as the

58. B. FALL, *THE TWO VIET-NAMS* (rev. ed. 1964).

59. *Id.* 358.

60. *Id.* 356.

dissolution of the old ICP in the 1940's to give the Laotian and Khmer Communist movements a semblance of national autonomy⁶¹

In terms of its political-administrative apparatus, the South Vietnamese insurgency operated until December, 1960, as simply an extension of the then-existing Communist underground apparatus. . . .

Inside South Viet-Nam, the Viet-Minh seems to have maintained its old administrative structure of Interzones (lien-khu) V and VI, the former covering Central Viet-Nam south of the 17th parallel, and the latter covering the Nam-Bo (the southern part, i.e., South Viet-Nam proper, or Cochinchina). . . .

On the military side, the two zone commanders are equals *and apparently get their orders directly from Hanoi*. In 1960-62, they were Brigadier General Nguyen Don for Interzone V and a "civilian" guerrilla leader, Nguyen Huu Zuyen, for the Nam-Bo.⁶²

Fall speaks of "Regiment 126, reinforced by a special 600-man battalion, infiltrated into South Viet-Nam in May, 1961, and likewise operating in the mountains west of Quang-Ngai . . .,"⁶³ and reports that by mid-1963 infiltration may have involved 12,000 men.⁶⁴ He also points out that Americans were authorized to "shoot first" only in February, 1963.⁶⁵

United Nations Secretary General U Thant, although disagreeing with those categorizing the National Liberation Front as a mere "stooge" of Hanoi, nevertheless says that the N.L.F. receives "perhaps very substantial help from the North."⁶⁶ And according to Douglas Pike, whom Arthur Schlesinger describes as the most careful student of the Viet Cong,⁶⁷ Hanoi was involved in the planning and direction of

61. *Id.* 357-58.

62. *Id.* 355 (emphasis added).

63. *Id.* 353.

64. *Id.* 330. Fall also writes that:

Close to 100,000 South Vietnamese of Communist obedience left the southern area for North Viet-Nam, thus providing the latter with native southerners a plenty who were given extensive training for later operations in their home areas; among them were close to 10,000 mountaineers from the Central Plateau area. At the same time, the repatriates going north included the dependents of the hard-core fighters who were ordered to go underground in the south, as well as the raw recruits with whose training and protection the southerners had been burdened until then.

Id. 358-59.

65. *Id.* at 333.

66. N.Y. Times, Jan. 11, 1967, at 4, col. 5.

67. A. SCHLESINGER, THE BITTER HERITAGE 18 (1967). Bernard Fall says of Pike: Pike's presence is one of those small illustrations of the good side of the American system. No other book is likely to demolish more completely and more seriously all the convenient myths dished out officially about the National Liberation Front (NLF), for this is the work of an "insider." In his job Pike sees more material than anyone except the Front Leaders themselves. He has read reports from captured Viet Congs,

N.L.F. activities from the very beginning of the Front in 1959 and provided from the start what the N.L.F. most needed, organizational knowhow and expertise in insurgency.⁶⁸ As Pike puts it, "By 1959 an over-all directional hand was apparent. The struggle became an imported thing."⁶⁹ By the end of 1963, there was evidence not only of the

translations of the huge quantities of captured documents . . . and publications from Hanoi or from Front sources abroad.

Fall, *The View from Vietnam*, THE NEW YORK REVIEW OF BOOKS, Feb. 9, 1967, at 13, col. 2.

Although not all scholars agree with Douglas Pike's thesis "that the DRV was . . . the godfather of the NLF," see D. PIKE, VIET CONG 321 (1966), most concede that the DRV played a significant role in the development of the Front and that Hanoi provided significant military leadership and assistance from about 1959-60.

According to Schesinger:

The civil insurrection in South Vietnam began to gather force by 1958; it was not until September 1960 that the Communist Party of North Vietnam bestowed its formal blessing and called for the liberation of the south from American imperialism.

Ho Chi Minh was now supplying the Viet Cong with training, equipment, strategic advice and even men—perhaps two thousand a year by 1960.

A. SCHLESINGER, THE BITTER HERITAGE 17 (1967).

Bernard Fall rejects both the Lacouture-Devillers thesis that the insurgency began "simply as an internal response to the repressive nature of the Diem regime" and the "White Paper" thesis that the insurgency was instigated from the North. He adopts a middle position which seems to concede that Hanoi played a significant role. See B. FALL, VIET-NAM WITNESS 130-32 (1966); M. RASKIN & B. FALL, THE VIET-NAM READER 252-61 (Vintage ed. 1965). See also P. HONEY, *supra* note 37, at 25-26, 67-68.

Even Lacouture gives a chronology indicating D.R.V. intervention prior to major United States expansion of forces. He writes: "[I]n 1960 the N.L.F. had been created with the authorization of Hanoi, which thus renounced its non-intervention; in 1961 the United States entered the war." J. LACOUTURE, VIETNAM: BETWEEN TWO TRUCES 61 (Vintage ed. 1966).

Denis Warner's account of the beginning of the second Indo-China conflict indicates that Hanoi played a significant role which preceded the first substantial United States response in late 1961 and early 1962 and that prior to that time Hanoi had "abandoned any pretence that it was not behind the rising tide of violence." D. WARNER, THE LAST CONFUCIAN 162 (Penguin ed. 1964); see also *id.* 160-76.

Brian Crozier's account strongly suggests that although the Viet Minh were a minority when the second conflict broke out at the beginning of 1958, the North was substantially directing the southern guerrillas prior to the end of 1961. He also says: "Indeed the evidence of North Vietnamese direction and control of operations in South Vietnam is overwhelming." B. CROZIER, *supra* note 47, at 137; see also *id.* 96-97, 135-43.

Professor Zasloff wrote in 1961 prior to major buildup of United States advisers in South Viet Nam:

Currently the government of South Viet Nam is struggling for survival against well-organized, strongly sustained guerrilla forces—the Viet Cong—inspired and supported by the Communist Vietminh government of the North, which has made no secret of its goal of crushing the southern government and uniting Viet Nam under its hegemony.

Zasloff, *Peasant Protest in South Viet Nam*, in M. KAPLAN, THE REVOLUTION IN WORLD POLITICS 192 (1966).

68. See D. PIKE, VIET CONG 77-84 (1966).

69. *Id.* 78. Pike also points out:

[T]he creation of the National Liberation Front, . . . was premeditated, planned, organized at length and in detail, and then pushed and driven into existence and operation. Such an effort had to be the child of the North.

Id. 80.

In differentiating the current Viet Nam conflict from the earlier Viet Minh war, Pike says:

[T]he later struggle in the South had a distinct imported quality about it that did not characterize either the Viet Minh war or the Communist revolution in China. The alien character was not simply a matter of outside aid or leadership. The struggle was in essence an expansionist drive by the North Vietnamese who asserted, and

presence of two North Vietnamese generals in the South⁷⁰ but northern trained cadres were being captured in numbers.⁷¹ When the Viet Cong buildup in mid-1964 made increased material support necessary, Hanoi sent anti-aircraft and heavier weapons south.⁷² And according to Pike, by the end of 1965 the N.L.F. was taken over by cadres from North Viet Nam, even down to the village level, a regularizing process which began in mid-1963.⁷³ There is evidence that regular units of the Army of North Viet Nam were moving into the South⁷⁴ prior to commencement of regular bombing of the North, and subsequent to 1965 it is clear that such regular units were substantially engaged in the South.⁷⁵ The seriousness of this military threat is indicated by the Mansfield Report which reported that at the time regular bombing of the North began, South Viet Nam was in imminent danger of total collapse.⁷⁶ This Viet Cong-North Viet Nam attack is the kind of serious and sustained attack threatening political and territorial integrity which justifies assistance to the South and an interdictive defensive response against the territory of the North.

As a matter of policy preference, Professor Falk argues that in a Type II conflict off-setting military assistance must be confined to the internal arena as an alternative for limiting violence.⁷⁷ This rationale

truly believed, that their goal of reunification was legally and morally justified.
Id. 53.

70. *Id.* 102.

71. *Id.* 323. In what he describes as a conservative estimate, accurate within plus or minus 10%, Pike sets out the following figures on infiltrators:

NLF Cadres from the North, 1954-1965

Year	Number
1954 through 1960	1,900
1961	3,700
1962	5,800
1963	4,000
1964	6,500 (at least a third Northerners)
1965	11,000 (almost all Northerners)
	<hr/> 32,900

Id. 324.

72. *Id.* 321, 325.

73. *Id.* 116

74. See MANSFIELD, MUSKIE, INOUYO, AIKEN & BOGGS, *THE VIETNAM CONFLICT: THE SUBSTANCE AND THE SHADOW—REPORT TO THE SENATE COMMITTEE ON FOREIGN RELATIONS*, 112 CONG. REC. 140, 141 (daily ed. Jan. 13, 1966); N.Y. Times, July 31, 1966, at 2, col. 5. See also D. PIKE, *VIET CONG* 164 (1966).

75. N.Y. Times correspondent Charles Mohr reported in August, 1966, that according to informed sources the latest intelligence estimates indicated that "... of the 177 enemy combat battalions in South Vietnam, 81, or 46 per cent, are now North Vietnamese" N.Y. Times, Aug. 10, 1966, at 1, col. 4, at 5, col. 5.

76. See MANSFIELD *et al.*, *supra* note 74, at 140.

77. See Falk, *International Law and the United States Role in the Viet Nam War*, 75 YALE L.J. 1122, 1123 (1966).

is suspect as a blanket proposition and is especially weak as applied to Viet Nam. North Viet Nam is not simply a third party state providing assistance to a completely independent insurgency in "an internal struggle for control" of another state. Falk's implicit characterization of the conflict between North and South as "civil strife" or at least much of the evidence that he relies on to characterize the conflict as Type III⁷⁸ suggests the obvious weakness of simply treating North Viet Nam as a third party rendering assistance to an independent insurgency. But in making the alternative Type II characterization of the conflict he swings to the other extreme of minimizing the very important relationships between North and South—particularly the significant interrelation between the National Liberation Front and the Communist party apparatus of North Viet Nam. North Viet Nam is one half of an at least de facto divided nation rendering assistance across an international cease-fire line to an armed insurgency in the other half whose leadership is significantly interrelated with leadership in Hanoi. It is generally believed that a more or less long run objective of that assistance is to unify Viet Nam under the leadership of the Communist party of Viet Nam, largely dominated by the North.⁷⁹ North Vietnamese Premier Pham Van Dong's reiterated goals of "freedom and independence" cannot be meaningfully interpreted as applying only to North Viet Nam. Given the continuation of the struggle, they can only be interpreted as signifying a wider intention encompassing South Viet Nam as well. To assert that the war "should be viewed as primarily between factions contending for control of the southern zone," is to minimize this important relationship and objective of North Viet Nam and indeed the whole background of the conflict. Real-world Viet Nam will not fit either Falk's Type II or Type III paradigms, and certainly cannot be both at once. Although the assistance from the territorially adjacent North is covert and is supported by a substantial network of indigenous guerrillas, the long run objectives of the North have significant similarity with those of North Korea in the overt invasion of South Korea. They are not simply those of a third party assisting state such as the territorially remote assisting participants in the Spanish

78. See notes 15 & 45 *supra*.

79. According to Harrison Salisbury: "Both the Northern regime and the Liberation Front are committed to reunification and the creation of a single Vietnamese state." N.Y. Times, Jan. 16, 1967, at 1, col. 1, at 10, col. 3. But according to Wilfred Burchett: "Reunification is a long-range project realizable only in the far distant future, which Vietnamese leaders in the North and Liberation Front leaders in the South privately agree may be 10 or 20 years away." Charlottesville Daily Progress, Feb. 10, 1967, at 1, cols. 1-2. See also D. PIKE, VIET CONG 367-71 (1966); A. EDEN, TOWARD PEACE IN INDO-CHINA 21-22 (1966); P. HONEY, *supra* note 37, at 168-71.

Civil War. Although, of course, there are many differences, the analogy to the Korean War is for this reason alone closer than Professor Falk's analogy to the Spanish Civil War.⁸⁰ In determining permissibility of defensive measures against the territory of an assisting participant the objectives of the participant in rendering assistance and its relationship to the insurgency are highly relevant. North Viet Nam is not simply assisting in a struggle for "internal control" of the South but is substantially tied up with the military and political leadership of the insurgency in the South and has as a major, although possibly long term objective, unification with the South. This is not to argue the extent of the military assistance Hanoi was providing in the early years. The importance of the amount of that early assistance whether small or large has been greatly oversold.⁸¹ But it is to indicate that prior to regular interdictive attacks against the North, Hanoi was so involved in the conflict in terms of its objectives in rendering assistance and its interaction with the Viet Cong that it is anomalous to speak of it as just a third party assisting state.

It should also be pointed out that there is conflicting evidence on the extent to which Hanoi was the moving party in the effective insurgency and that Professor Falk's model, which relies heavily on the controversial Lacouture-Devillers thesis, is one which minimizes Hanoi's role.⁸² If a third state substantially initiates an insurgency instead of simply rendering assistance to an on-going insurgency it would seem anomalous to treat it as within Falk's Type II conflict. If the reality is that the *effective military insurgency* in South Viet Nam was substantially initiated and is substantially supported and directed by the Communist party of Viet Nam largely controlled from Hanoi, Falk's view applied to Viet Nam would simply immunize states invading covertly.

Further, even in a Type II paradigm, to restrict defensive response to the internal arena may be an undesirable restriction of the right of defense in the absence of a more effective peace-keeping machinery. It

80. See Falk, *supra* note 77, at 1126.

81. I share Schlesinger's judgment that the same is true of the failure to hold the 1956 elections. See A. SCHLESINGER, *supra* note 67, at 15.

82. Douglas Pike's overall thesis seems to assign a substantial role to Hanoi in the creation of the effective military insurgency in the South, see D. PIKE, *supra* note 79, in contrast to Professor Falk's "interpretation of the internal war as primarily a consequence of indigenous forces." Falk, *supra* note 77, at 1129. The Canadian representative to the I.C.C. concluded in a minority statement to the February 13, 1965, Special Report that North Vietnamese activities "aimed at the overthrow of the South Vietnamese administration . . . constitute the root cause of general instability in Vietnam . . ." SPECIAL REPORT TO THE CO-CHAIRMEN OF THE GENEVA CONFERENCE ON INDO-CHINA, FEBRUARY 13, 1965 (Vietnam No. 1) CMND. No. 2609, at 14-15 (1965). For discussion of this 1965 Special Report which was prompted by the commencement of regular bombing of the North see Dai, *supra* note 46, at 171-72.

would mean, in effect, that a state might have to endure interminable outside intervention with little hope of ending the conflict by appropriate defensive actions. Presumably under this thesis even a widely recognized government could not defend its territory from massive external military assistance to insurgent factions, because if it could it would seem that assisting states participating in collective defense with the state attacked should have the same defensive rights. Although Falk's proposed rule might theoretically minimize international escalation, it might also maximize destruction within the unfortunate internal arena that gets trapped as the battleground and it might encourage external intervention in general. The Spanish Civil War does show the great internal destructiveness of a territorially restricted conflict in the absence of an effective sanction against intervention. In a world relying heavily on power the right of *effective* defense is a major deterrent to outside intervention in internal conflicts. Providing immunity to the real bases of power of the attackers both fails to provide an effective sanction against third party assistance and drastically undermines defensive rights. In doing so it closes out an option which may in some situations be the most effective method of conflict resolution at least cost to all participants. In the final analysis that is the real question and one not convincingly answered by Professor Falk's *a priori* "geographic" rule. For a number of reasons, then, there is considerable question whether the proposal to immunize the territories of intervening nations would in the long run reduce conflict or whether it would increase conflict by encouraging intervention and prolongation of conflict. Moreover, as the interdictive response against North Viet Nam illustrates, the alternatives in proceeding against an aggressively assisting external power are considerably greater than an either-or, all or nothing response. It might be that enlightened community policy would rule impermissible all out attack against the territorial and political integrity of such an assisting entity while allowing necessary limited defensive measures against resources closely related to the assistance. This alternative, which is the one being pursued in Viet Nam, stops short of ultimate escalation of the conflict while providing some sanction against unlawful military intervention.

There are sound reasons for suggesting, just as there are for doubting, that the limited bombing of the North may be an option leading to termination of conflict in the shortest period of time at least cost to all participants. Without the interdictive attacks against the North there might be less reason for the North ever to stop rendering assistance to

the insurgents or to seek a negotiated settlement. The cost of guerrilla attack is by the lopsided arithmetic of such conflict much less than the cost of defense. The interdiction attacks both substantially raise the cost of assistance to the insurgents in the South, and impede assistance reaching the insurgents. They were initiated in close support of the struggle in the South in terms of supply, morale and settlement factors and do lend support to the defensive effort in these respects. To balance the picture, though, it should be pointed out that as a strategy choice, the effect of the bombing is difficult to assess and it has some serious weaknesses. For example, it is unable to prevent a substantial flow of assistance from reaching the South, it increases the risk of international escalation, it may harden the attitude of the citizenry of the North, and it has a strong negative effect on world opinion. In view of the question marks connected with it, the limited bombing of the North may or may not be the best strategy for pursuing legitimate defense objectives in Viet Nam, but it is within the range of reasonable responses, allowing for supportable differences of opinion as to the effectiveness of a particular strategy for conflict termination.

At one point Professor Falk contends that "since the United States has far greater military resources potentially available, our use of insufficient force violates general norms of international law."⁸³ But surely it does not violate international law to take into account the risk of escalation and of generating a nuclear war if the objective is widened from limited defensive aims. His combined argument, then, seems to be that given some United States response, international law may require a greater military commitment in the South with no hope of proceeding against the major resources in the North which are facilitating continuation of the struggle. By this observation Falk seems to have put his finger on a major difficulty with his proposal for limiting permissible response to the internal arena in Type II conflict. Since international law does seek conflict minimization by a requirement of effective force, shouldn't such force be applied against military resources whether within or without the internal arena, if a determination is reasonably made that such response is necessary to end the conflict with minimum destructiveness on all sides? This determination must, of course, include assessment of the risk of conflict escalation under each alternative and must be reasonable under all the circumstances, allowing some leeway for reasonable differences of opinion as to the effectiveness of a particular strategy. But Falk's proposed terri-

83. See Falk, *supra* note 77, at 1144.

torial limitation on responding defensive measures cuts down on a series of options which may well lead to conflict resolution with minimum destructiveness for all participants. The determination of what course of action will end the conflict with minimum destructiveness and risk is, of course, the real question and one which in the terribly difficult Viet Nam context is not served by the sterile accusation that "our use of insufficient force violates general norms of international law."

In view of Professor Falk's concern with conflict minimization evident in his proposal to limit responding coercion to the internal arena of a Type II conflict, it would also seem important to stress the danger to world order in providing assistance to insurgents across an international cease-fire line in a country at least de facto divided between the major contending public order systems. With respect to these activities of the North, however, he merely says "international law neither attempts nor is able to regulate support given exile groups. The activities of Hanoi between 1954 and 1964 conform to patterns of tolerable conflict in contemporary international politics."⁸⁴ And he concludes: "North Viet Nam's action does not seem to constitute 'aggression.'"⁸⁵ As a description of power processes these statements may be accurate, but as statements of contemporary international law and policies of conflict minimization they are not the most useful picture.

The United Nations has repeatedly condemned the creation or support of civil strife by external elites using internal agents. Thus the General Assembly said in condemning external assistance to the Communist guerrillas in Greece:

84. *Id.* 1139.

This statement is also misleading in failing to advert to Hanoi's activities with respect to Laos during this period. North Vietnamese intervention in Laos has been on a substantial scale, has not been confined to supporting exile groups and has been in flagrant disregard of the Geneva Accords of 1962. Yet this intervention in Laos is in close support of Hanoi's activities against South Viet Nam.

John Hughes, staff correspondent of The Christian Science Monitor, writes from Laos that:

Though Laos is technically neutralized by the Geneva agreement of 1962, it in fact harbors what Premier Souvanna Phouma estimates to be 60,000 North Vietnamese troops, who of course have no right to be on Laotian soil. In part they are stiffening pro-Communist Pathet Lao units, but mainly they are support and garrison troops down the length of the Ho Chi Minh Trail, ensuring the continued passage through Laos to South Vietnam of North Vietnamese infiltrators.

Christian Science Monitor, May 3, 1967, at 1, col. 4. Some scholars indicate that Hanoi's military intervention in South Viet Nam should be placed in a larger temporal and geographical context of Viet Minh aggression against Laos and Cambodia and the drive for an all Indo-China Communist party dominated by Hanoi. See P. HONEY, *supra* note 37, at 168-71; B. CROZIER, *supra* note 47, at 114-33.

There is also evidence that North Viet Nam is providing training and assistance to insurgents operating in Thailand. See Christian Science Monitor, May 12, 1967, at 1, col. 2.

85. Falk, *supra* note 77, at 1159.

The General Assembly . . . condemning the intervention of a state in the internal affairs of another state for the purpose of changing its government by the threat or use of force,

Solemnly reaffirms that whatever the weapons used, any aggression, whether committed openly or by fomenting civil strife in the interest of a foreign power, or otherwise is the gravest of all crimes against peace and security throughout the world.⁸⁶

And the International Law Commission Draft of a Code of Offenses Against the Peace and Security of Mankind condemned:

The organization, or encouragement of the organization, by the authorities of a state, of armed bands within its territory or any other territory for incursions into the territory of another state; or the toleration of the organization of such armed bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operation or as a point of departure for incursions into the territory of another state as well as direct participation in or support of such incursions.⁸⁷

And as recently as December, 1966, the General Assembly "condemned all forms of intervention in the domestic affairs of States, and urged all States to refrain from armed intervention, subversion, terrorism, or other indirect forms of intervention for the purpose of changing the existing system of another State or interfering in civil strife in another State."⁸⁸ These representative pronouncements reflect the substantial community expectation that inciting or assisting civil strife is not only aggression, but is aggression presenting a particularly grave threat to minimum order in today's world. In postulating that external military assistance is inappropriate to influence the outcome in a Type III conflict, Falk seems to be concurring in this judgment although he later somewhat inconsistently asserts that "international law offers no authoritative guidance as to the use of force *within* South Viet Nam . . ."⁸⁹ The policy of conflict minimization strongly suggests the illegitimacy of military assistance to an insurgency sustained at a high level of coercion across de facto boundaries separating major contending public order systems.⁹⁰ Should the West Germans or Nationalist Chi-

86. G.A. Res. 380 (v), 5 U.N. GAOR Supp. 20, at 13, 17, U.N. Doc. A/1775 (1950). See also A. THOMAS & A. THOMAS, NON-INTERVENTION 226-29 (1956).

87. International Law Comm'n, Report, 9 GAOR, Supp. 9 at 10, 11 U.N. Doc. A/2693 (1954).

88. U.N. Weekly News Summary, Press Release WS/273, at 6 (December 22, 1965). It is peripheral but perhaps useful to point out that the recognition of contending public order systems does not depend on acceptance of dogma about "monolithic communism."

89. Falk, *supra* note 77, at 1155. See also *id.* 1137.

90. The interesting thesis of Robert Ardrey would to some extent seem to reinforce

nese provide sustained high levels of military assistance to insurgents in East Germany or mainland China, ultimately fielding regular army units, the threat to world order would be obvious. And if the analogies are not on all fours with Viet Nam, events in Viet Nam prove them relevant if not as obvious with respect to consequences for public order when such assistance is provided. In seeking to effectuate community policies of conflict minimization, it may be more effective to focus attention on the illegality of aggressive coercive strategies across *de facto* international boundaries rather than attempting to further restrict the right of defense against such aggressive strategies.

External Participation in Intra-State Conflict: A Policy Inquiry

Even though Professor Falk's "civil strife" framework does not seem sufficiently sensitive to crucial features of the total Viet Nam context to provide a valid analytic base for conclusion about that conflict, his framework is a creative contribution to stimulation of general policy inquiry with respect to external participation in intra-state conflict. Since his own conclusions about Viet Nam are based on this framework it may be helpful to attempt further clarification of the major policies applicable to external participation in intra-state conflict. This discussion is intended only to air some doubts about suggested norms for Type III conflict and is not intended to offer a definitive rule if, indeed, any is possible or desirable. In fact, preliminary inquiry suggests that "Type III conflict" may encompass too wide a variety of contexts to generalize meaningfully and that more sensitive contextual clarification may be desirable.

The principal policies relevant to decision about the permissibility of external participation in intra-state conflict seem to be self-determination and maintenance of minimum public order. Self-determination, the right of peoples within an entity to choose their own institutions and form of government, is a basic community policy reflected in community condemnation of intervention and colonialism. The striking thing about self-determination as a touchstone of permissibility is that realistically it may cut for as well as against outside intervention in an internal arena and it may cut for or against assistance to either insurgents or *de facto* government. In the colonial war

de facto control of territory as the important standard for purposes of conflict minimization. See generally R. ARDREY, *THE TERRITORIAL IMPERATIVE* (1966).

Brownlie indicates that "the right of self-defence should be based upon peaceful possession and *de facto* exercise of authority." I. BROWNIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 382 (1963).

in Algeria in 1960 self-determination may have been served by assistance to insurgents whereas in the Congo in 1961, in Greece in 1948, in Kenya, Uganda and Tanganyika in 1964, and possibly at the beginning of the Spanish Civil War in 1936, self-determination may have been better served by assistance to the government. A simplistic version of self-determination espoused by Hall⁹¹ and advocated by some, however, identifies self-determination with anything that happens in an entity. According to this view, states should be left alone in all circumstances to work out their own form of government. If aid to the recognized government were legitimate then it would impair the right to revolution and if aid to the insurgents were legitimate it would violate independence by interfering with the regular organ of the state. This judgment that self-determination requires that neither the recognized government nor insurgents can ever be aided conceals the naïve assumption that whatever takes place within the confines of a territorial entity is pursuant to genuine self-determination of peoples and that outside "intervention" is necessarily disruptive of self-determination. Such simplistic deductive notions that territorial entities should be left alone to work out their own self-determination at all costs and by any modalities ignores the twin reality that today ruthless governments in control of the total resources of a society can suppress their peoples and that minorities can through terror, sabotage and the control of the military establishment capture control of governmental machinery. The Hall view seems to adopt a kind of Darwinian definition of self-determination as survival of the fittest within the national boundaries, even if fittest means most adept in the use of force.

It may be that proscribing unilateral outside assistance to either faction will in fact result more often in genuine self-determination than allowing such assistance to either side. And the difficulty of appraising objectives of the assisting participants and determining where self-determination really lies may militate for this solution. If these assumptions really underlie a neutral rule of nonintervention in Type III conflicts, then we ought to recognize it as such and reflect both on the accuracy of the assumptions and on whether it is necessary to have this broad a prophylactic rule. Some relevant questions might be: What is the aggregate contemporary experience as to whether self-determination is aided or hindered by assistance to insurgents, by assistance to recognized governments, or by both? In what cases would a

91. See W. HALL, *INTERNATIONAL LAW* 287 (6th ed. 1909); W. HALL, *INTERNATIONAL LAW* 347 (8th ed. 1924).

broad prophylactic rule cut against self-determination and might we find recurring features which would signal an exception to the rule in those cases? In light of the great variety of situations presenting the problem, what is the criterion for "civil strife" triggering the rule? What functions do recognized governments serve that might make any such rule as to them more difficult or unworkable? Might legitimacy of aid to either faction be conditioned on holding free elections or on some other indicia of genuine self-determination? In view of the interdependencies among states in a world divided between contending states and blocs, to what extent is a rule focused on self-determination of only one entity realistic or desirable?⁹² What are the expectations that nations will observe such rules? Answers to these questions might militate for no rule, a neutral non-intervention rule or a more narrowly drawn rule aimed, for example, at assistance to insurgents. But without more the present arguments for a neutral non-intervention rule in all Type III conflicts are unpersuasive as a requirement of self-determination.

As seems implicit in the suggested norm for Type II conflict, any rule of non-intervention based on self-determination should be modified where one participant has received external assistance. Although self-determination might still cut either way, the rule is much too suspect to operate as a prophylactic rule against external intervention after there has already been intervention on one side.

A second major policy in analyzing the permissibility of external participation in intra-state conflict is the maintenance of minimum public order. An hypothesis for inquiry with respect to public order consequences is that external assistance to insurgent groups and the fomenting of civil strife by external elites is more often seriously disruptive of minimum public order than assistance to recognized governments. Assistance to insurgents often involves high risk of prolonged conflict with entrenched elites as well as high risk of expansion of the conflict through external support for the recognized government. Recognized governments may be incorporated in a world order bloc that views their overthrow as an unacceptable impairment of bloc power or security or they may have defensive arrangements with third powers which will be triggered by assistance to insurgents. It is one of the functions of government to preserve stability and maintain inter-

92. Professor Falk adverts to this question in pointing out that "the outcome of a Type III conflict may affect the relative power of many other countries." Falk, *supra* note 77, at 1126.

nal order and it is to be expected that ruling elites will resist change sought through force and will call on their established international partners to help them. Recognized governments usually control greater resources than insurgents and frequently control the organized military. These conditions make insurgent attacks employing guerrilla armies and terrorist tactics likely to be prolonged costly struggles. Compare, for example, such diverse situations as Hungary and the Dominican Republic with Algeria and Viet Nam. Moreover, fomenting an insurgency, or providing assistance to it in early stages, can be simply a sophisticated form of attack. Such attacks are particularly pernicious in that they are difficult to prove and are frequently couched in rhetoric about self-determination and social reform which may or may not be the principal objectives of the attacker.

As a rule to prevent outside powers from becoming involved with one another, there is little reason to believe that a "neutral" norm would be more effective than a rule prohibiting external assistance to insurgencies only. In fact, in the cold war context there is good reason to believe that it is particularly unrealistic to ask that military aid be withheld from continuing *de facto* governments. Soviet assistance to the regimes in Hungary and East Germany and United States assistance to Greece and South Viet Nam indicate that realistic projections militate against attempting to proscribe assistance to entrenched governments. In contrast, expectations of violence are particularly acute when assistance is rendered to insurgent elements across cold war boundaries. Determined United States assistance to Hungarian freedom fighters would have involved high risk of acute conflict with Russia. North Vietnamese assistance to insurgents in South Viet Nam has fueled a major conflict. And substantial military assistance by Formosa to mainland insurgents would seem to carry an especially grave risk of major war. It is an observable cold war phenomenon that major powers tend to support regimes threatened by military actions initiated or supported by opposing bloc powers. In light of this practice there is certainly a strong community interest in not attempting coercive change across such boundaries.

In contrast, public order consequences are not as acute in situations of less direct cold war confrontation. For example, in newly independent African countries intervention by a former colonial power on either side may not provide the same risk of protracted and escalating conflict although the risk of extended conflict is still significant and would usually be greater if intervention were on the side of the insur-

gents. Where the risk of major conflict is slight, grave and continuing denial of self-determination may outweigh dangers of the use of coercive strategies of change. But where such risk is grave, minimum public order may be the most important consideration.

It may be argued that since both sides may recognize separate elite groups as the lawful representative of the state, if any rule is to be effective in preventing outside powers from confronting each other on separate sides of a civil war, the rule must proscribe assistance to both government and insurgents. But although states can always prematurely recognize one or another group as the legal representative of a state, there is usually no doubt as to which side is the government and which the insurgents despite such opposing recognition. In Greece, Algeria, Spain, the Congo, South Viet Nam, Venezuela, Cuba, Colombia and Thailand, to name a few past and present trouble spots, there can be little doubt which authority was the real-world government. The situation of contending governments without territorial separation and both with approximately equal credentials in terms of past legitimacy, *de facto* governmental control and international recognition doesn't seem to be the major "civil strife" problem. Even if this were a problem one criterion for assistance to a government should be that it is the only widely recognized *de facto* or *de jure* government.⁹³

A rule of no assistance to either faction also runs into the problem that it is a not uncommon practice to enter into treaty arrangements with a widely recognized government to assist it in maintaining the existing form of government against external attack or internal subversion. This practice reflects the real interdependencies felt among nations. Query whether assistance to a recognized government should be impermissible if pursuant to such a pre-existing treaty of guarantee or assistance or whether failure to honor such a treaty would itself amount to intervention? A major difference between the insurgents and government is that the government is the internationally authorized agency to receive external assistance. To prohibit such assistance is more difficult than proscribing assistance to insurgents. There are at least two other reasons for this greater difficulty in addition to the problem of pre-existing treaties. First, since the recognized government

93. A related question is to what extent assistance to exile groups such as the Bay-of-Pigs exiles or the South Vietnamese that had gone North in 1954 is legitimate in situations where assistance to insurgents would be otherwise illegitimate. Although this circumstance may somewhat strengthen claims from the standpoint of self-determination, it is hardly decisive of genuine self-determination and has only peripheral relevance with respect to the policy of minimum public order.

is the international agency of the state entitled to receive assistance, it is legitimate even under a "neutral" norm to render assistance *prior* to "civil strife." Under this norm, then, a difficult fact determination must be made as to when "the outcome is uncertain"⁹⁴ or "civil strife" or "belligerency" or "insurgency" or some such cabalistic point has been reached before assistance becomes impermissible. By that point an assisting state may already feel committed. It is probably unrealistic to assume that assistance will often be stopped after once being legitimately begun, particularly if the facts are at all hazy, as they usually are. Moreover, could levels of assistance provided prior to "civil strife" be continued as, for example, the Military Assistance Advisory Group in Viet Nam? Must they be, on the theory that a reduction amounts to intervention on the side of the insurgents? And if some level of assistance is permissible or mandatory, is it realistic to argue that it cannot be increased?

This picture is further complicated with respect to assistance to the government forces in that one of the functions of the government is to maintain order within the community. Although at some point one can philosophically argue that maintenance of order must yield to the right to revolution, until that point is reached external assistance may be consistent with internal autonomy. Because of this function of government within the internal arena, as well as its function as international representative of the state, there is likely to be great difficulty in determining when the level of "civil strife" is such that assistance is violative of internal autonomy. Secondly, since under Professor Falk's framework assistance to a recognized government becomes legitimate again after significant military assistance has been received by the insurgents, another difficult determination must be made as to when such assistance has been rendered. But because of the difficulty of proving covert assistance to the insurgents, as Viet Nam aptly demonstrates, assistance to the recognized government even if legitimately provided in a Type II situation is likely to remain shrouded in controversy and condemned as much as, or more than (because more visible) assistance to the insurgents. Query also whether Professor Falk intends that offsetting assistance to insurgents would be permissible as a Type II conflict after the recognized government has received assistance? This would be the ultimate in "neutral" rules. Under such a rule almost any situation could become open-ended. For since the recognized govern-

94. See generally Wright, *United States Intervention in the Lebanon*, 53 AM. J. INT'L L. 112, 121-22 (1959).

ment is entitled to receive assistance prior to civil strife, external elites assisting both sides will point out that the other side's aid legitimates their own. It would seem then that an effective rule for conflict minimization must at least proscribe counter-intervention (legitimate in Type II conflict) on behalf of insurgents.

Because of the real functions of recognized governments any attempt to fashion "neutral" rules treating the government and insurgents alike is suspect. There are some reasons for suggesting that a rule preventing assistance to insurgents only might be a more realistic and no less efficacious rule in many contexts than a rule preventing assistance to both factions. Such a rule might also desirably focus attention on the probably greater threat of providing assistance to foment civil strife as compared with assistance to a widely recognized government.

Although scholars are divided on the permissibility of assistance to the two sides in Professor Falk's Type III conflict, the area of disagreement significantly reflects the greater danger to world order of providing assistance to insurgents rather than to a widely recognized government. There are a number of writers who take the position that international law does not prohibit assistance to a recognized government in a Type III conflict, and there are substantial community expectations that such assistance is permitted even if its purpose is to assist in suppressing civil strife.⁹⁵ There is, on the other hand, wider agreement that assistance to insurgents is impermissible.⁹⁶

Although exploration of the role of international law in dealing with "civil strife" will not by itself result in valid answers for Viet Nam, such exploration is relevant to the Viet Nam problem. A preliminary attempt to clarify community policies most relevant to contexts of "civil strife" indicates that the "civil strife" structures relied on to condemn United States policy in Viet Nam are over-simplified—even if Viet Nam could be treated as "civil strife". Professor Falk's Type III conflict encompasses a range of different contexts from colonial wars to "wars of national liberation" and it may be preferable that

95. See the authorities collected in Moore & Underwood, *The Lawfulness of United States Assistance to the Republic of Viet Nam*, 112 CONG. REC. 14,943, 14,975-76 n.179 (daily ed. July 14, 1966), and the discussion in Moore, *The Lawfulness of Military Assistance to the Republic of Viet Nam*, 61 AM. J. INT'L L. 1, 28-32 (1967).

96. See the authorities cited in note 95, *supra*.

In the context of Viet Nam, whatever assistance to insurgents might otherwise be permissible is clearly prohibited by the express provisions of Articles 19 and 24 of the Agreement on the Cessation of Hostilities. In its 1962 Special Report, the International Control Commission found that "there is sufficient evidence to show beyond reasonable doubt" that North Viet Nam had violated these provisions. SPECIAL REPORT TO THE CO-CHAIRMEN OF THE GENEVA CONFERENCE ON INDO-CHINA (Vietnam No. 1), CMND. No. 1755 (1962). 31 PARL. SESSIONAL PAPERS 7 (1961-62).

resulting norms be more contextually discriminating. That genuine self-determination requires in situations of "civil strife" that assistance never be provided either insurgents or the government is questionable. With respect to the policy of minimum order, assistance to insurgents seems considerably more dangerous than assistance to a widely recognized government. This difference and realism about cold war expectations suggest that at least in inter-bloc contexts it may be preferable to have a norm condemning unilateral assistance to insurgents and thereby focusing attention on the greater threat rather than attempting to prohibit assistance to both widely recognized governments and insurgents. Community expectations more clearly condemning such assistance to insurgents and problems implicit in the functions of the recognized government also militate for distinguishing between assistance to insurgents and widely recognized governments. Whatever the ultimate solution, if any in terms of such rules, the assistance of the United States to South Viet Nam would seem to be a permissive defensive response to at least off-set substantial military assistance provided to the Viet Cong. North Vietnamese assistance to the Viet Cong, however, exceeds tolerable levels of inter-bloc coercion and is an impermissive strategy of attempted change.

In appraising the role of international law in intra-state conflict, clarification of the process side—the international machinery and procedures to control conflict—is as deserving of attention as normative clarification. Substantial progress toward the rule of law in large measure depends on more effective centralized or regional peacekeeping machinery. Effective regional organizations able to make authoritative fact determinations and to authorize collective action to keep the peace would go far to alleviate the problem of regulating external participation in intra-state conflict. The United Nations Congo and Cyprus operations show that in some contexts (principally characterized by an absence of high order conflict between the major competing ideological systems) the United Nations can be an effective participant in controlling such conflict. It is important that these hopeful precedents be strengthened and it is tragic that the United Nations has been unable to significantly moderate the Viet Nam conflict. Certainly every effort should continue to be made to strengthen its role. But emphasis on the process side, however necessary for achieving more effective control of international coercion, should not obscure fundamental differences in attitudes of major participants regarding existing peacekeeping machinery. Although the United States has formally placed before the Security Council a draft resolution calling for im-

mediate negotiations without preconditions and indicating willingness to achieve the purpose of the resolution by arbitration or mediation,⁹⁷ Hanoi and Peking have consistently rejected any role for the United Nations in settling the Viet Nam war.⁹⁸ Similarly, emphasis on the process side should not downgrade the relevance of the existing normative structure. We have not yet attained an ideal world and in the absence of a more effective peacekeeping process the existing normative structure condemning force as a strategy of major international change and preserving the right of defense against major military attack remains the principal framework for appraisal of the Viet Nam war.

The State Department Brief in Context

One of the principal strengths of an approach to foreign relations which inquires of "international law" as opposed to the neo-realist

97. See N.Y. Times, Feb. 1, 1966, at 12, cols. 2-6.

98. Secretary General U Thant said at a news conference on February 24, 1965:

The government of North Viet-Nam has all along maintained that the United Nations is not competent to deal with the question of Viet-Nam since, in its view, there is already in existence an international machinery established in 1954 in Geneva. They have all along maintained that position and, as you all know, it is a position also maintained by the Peoples Republic of China. As far as the United Nations is concerned, I think the greatest impediment to the discussion of the question of Viet-Nam in one of the principal organs of the United Nations is the fact that more than two parties directly concerned in the question are not members of this organization. I therefore do not see any immediate prospect of useful discussion in the Security Council

Press Conference, Feb. 24, 1965, quoted in M. RASKIN & B. FALL, *THE VIET-NAM READER* 263, at 267 (Vintage ed. 1965).

As stated by Pham Van Dong, the North Vietnamese position is:

The Government of the Democratic Republic of Vietnam declares that . . . any approach tending to secure a U.N. intervention in the Vietnam situation is also inappropriate because such approaches are basically at variance with the 1954 Geneva Agreements on Vietnam.

RECENT EXCHANGES CONCERNING ATTEMPTS TO PROMOTE A NEGOTIATED SETTLEMENT OF THE CONFLICT IN VIET-NAM (Viet-Nam No. 3) CMND. No. 2756, at 51 (1965). Hanoi reiterated this stand by way of public reply to the March 14th peace proposals of Secretary General U Thant. The public statement of Hanoi asserted:

[I]t is necessary to underline once again the views of the Government of Hanoi, which has pointed out that the Viet-Nam problem has no concern with the United Nations and the United Nations has absolutely no right to interfere in any way in the Viet-Nam question.

56 DEP'T STATE BULL. 618 (1967).

Peking militantly declares:

The United Nations has never taken a just stand on the Viet Nam question. It has absolutely no say concerning a settlement of the South Viet Nam question. . . .

U.N. intervention in affairs of Indo-China cannot be tolerated. . . .

We would like to advise U Thant: save yourself the trouble. There is nothing for the United Nations to do in Viet Nam, neither is it qualified to do anything there. Extract from an article in the Peking Peoples' Daily "Serious Advice for U Thant" contained in RECENT EXCHANGES, *supra*, 54-55.

It might also be noted that Hanoi refused to submit the Tonkin Gulf incident to Security Council investigation despite a South Viet Nam request and offer to send a delegation to the Security Council to participate in debates on the incident. See Moore & Underwood, *The Lawfulness of United States Assistance to the Republic of Viet Nam*, 112 CONG. REC. 14,943 (daily ed. July 14, 1966), reprinted in DUQUESNE L. REV. 235 (1967), at note 228 and accompanying text.

preoccupation with "the national interest"⁹⁹ is that a balanced international law approach seems to achieve a real focus on clarification of long run community interest. The kinds of questions focused on in this legal dialogue—regulation of international use of force and regulation of external participation in internal strife—achieve a different focus from *realpolitik* discussions of the same problems and as such add an additional dimension to the policy considerations available to the national decision maker. In these inquiries policy justification is not principally short run national interest but common and long run community interest. Legal discourse can also aid in evaluating legal arguments made by the adversaries and used as the basis of attacks on or justification for national policy, for example North Viet Nam's assertion that it has a legal right to use force against South Viet Nam. A balanced international law approach, one neither unduly focusing on "legal idealism"¹⁰⁰ nor "naked power"¹⁰¹ and not legalistically self-limiting, is relevant to problems such as Viet Nam. Because of this relevance, I share Professor Falk's view that inquiry of international law is an important and helpful inquiry for the national decision maker and that international law should not be used by either side solely to "bolster or bludgeon foreign policy positions . . ."¹⁰² Professor Falk's criticism of the State Department brief as "formalistic" and "legalistic" and as responding to irrelevant and trivial points,¹⁰³ however, is unfair without further exposition of the context in which it was written. As he points out, the State Department brief was principally written in response to arguments made in the Lawyers' Committee Memorandum¹⁰⁴ which had been widely circulated in the United States and to similar legal arguments which were being made by some members of Congress. Many of the legal arguments made in the Lawyers' Committee Memorandum and in Congress against the United States position, such as the arguments that a member of the United Nations can not collectively assist in defense of a non-member and that it is unconstitutional to commit United States armed forces to South Viet Nam with-

99. See H. MORGENTHAU, *POLITICS AMONG NATIONS* 227-33, 275-311 (3d ed. 1966); H. MORGENTHAU, *IN DEFENSE OF THE NATIONAL INTEREST* (1951); Morgenthau, *To Intervene or Not to Intervene*, 45 *FOREIGN AFFAIRS* 425 (1967).

100. This is a sound admonition from George Kennan. See generally G. KENNAN, *AMERICAN DIPLOMACY 1900-1950* (1951).

101. See, e.g., H. MORGENTHAU, *supra* note 99.

102. See Falk, *supra* note 77, at 1155. See also Meeker, *Role of Law in Political Aspects of World Affairs*, 48 *DEPT STATE BULL.* 83 (1963).

103. Falk, *supra* note 77, at 1139, 1146, 1155.

104. Memorandum of Law of Lawyers' Committee on American Policy Toward Vietnam, reprinted in 112 *CONG. REC.* 2552-59 (daily ed. Feb. 9, 1966).

out a formal congressional declaration of war, were legalistic in the extreme. They were also inaccurate, and Falk properly repudiates them.¹⁰⁵ Such arguments had achieved a wide hearing, however, and were given substantial credence by many laymen and even some members of the bar. In fact, the "word magic" of the article 51 collective defense argument was still a major tenet of arguments against lawfulness made by the Chairman of the Lawyers' Committee in an article in the *American Bar Association Journal* as late as July, 1966.¹⁰⁶ Moreover, a number of outstanding international legal scholars, including Professor Falk, had become associated with the Lawyers' Committee efforts and by their association lent credence to these and other legalistic arguments made in the Memorandum.¹⁰⁷ Because of this widespread credence which the adversary arguments of the Lawyers' Committee achieved, and their use as a basis for criticizing Viet Nam policy, they needed reply if there was to be balanced appraisal of the issues. The State Department brief performed that function. And although Professor Falk emphasizes the adversary nature of the State Department brief he does not point out that the Lawyers' Committee Memorandum was at least an equally adversary document. Candor would suggest acknowledgment that both sides in the Viet Nam debate have tended to take adversary positions.¹⁰⁸

105. See Falk, *supra* note 77, at 1139-40, 1154.

106. See Standard, *United States Intervention in Vietnam Is Not Legal*, 52 A.B.A.J. 627 (1966).

107. See Letter from the Lawyers' Committee to President Lyndon B. Johnson, Jan. 25, 1966, reprinted in 112 Cong. Rec. 2551-52 (daily ed. Feb. 9, 1966). Professor Falk is currently Chairman of the Consultative Council of the Lawyers' Committee. The work of the Consultative Council has been somewhat better than the earlier much circulated Lawyers' Committee efforts but is still essentially a one-sided argument.

For an example, see *The Military Involvement of the United States in Vietnam: A Legal Analysis* (1966).

Scholars certainly have a duty to appraise the activities of their own as well as foreign governments. See generally Finman & Macaulay, *Freedom to Dissent: The Vietnam Protests and the Words of Public Officials*, 1966 Wis. L. Rev. 632. The point is simply that the wide circulation of the Lawyers' Committee Memorandum, endorsed by leading international law scholars and accompanied by the vocal theories of some Congressmen, created public attitudes about a number of legal points which it was hardly irrelevant or trivial to rebut. The legalistic "decaration of war" and "non-member" arguments were two of the principal arguments against lawfulness held out to the public.

108. Even the latest Lawyers' Committee efforts can only be fairly described as adversary in nature. See *The Military Involvement of the United States in Vietnam: A Legal Analysis*, *supra* note 107, and the nearly full-page advertisement "U.S. Intervention in Vietnam is Illegal," N.Y. Times, Jan. 15, 1967, at E 9.

According to a 1965 report of the International Association of Democratic Lawyers, apparently circulated principally in Europe, the Lawyers' Committee Memorandum was "distributed to 250,000 American lawyers." The Return of an I.A.D.L. Delegation from Vietnam, 1965, at 9 (unpublished manuscript). An advertisement of the Lawyers' Committee puts the distribution figure at 173,000 lawyers. THE NEW REPUBLIC, June 24, 1967, at 29. The advertisement also boasts distribution of 23,000 reprints of the N.Y. Times advertisement. *Id.*

It is perhaps inevitable in any on-going national dialogue with the importance of the Viet Nam debate that both sides will appeal as adversaries to legal arguments. Perspectives about authority are important in evaluating the wisdom of policies, and both proponents and opponents characteristically invoke legalities. The administration stress on the "obligation" arising from the SEATO Treaty¹⁰⁹ and the critics "non-member" argument are examples of attempts to invoke authority for contending foreign policy positions. When such appeals are made, the importance of perspectives about authority in shaping national policy make it important for legal scholars and advisors to point out essential discrepancies. In doing so they should recognize that they are performing only one task of the scholar or adviser and that, to the extent possible, clarification of community policies prior to decision may be a more important task.

The Vestiges of a Constitutional Attack

Although Professor Falk rejects the early Lawyer's Committee arguments that the President has no constitutional authority to use American military forces in Viet Nam without a declaration of war,¹¹⁰ he contends that:

The President has the constitutional authority to commit our armed services to the defense of South Viet Nam without a declaration of war *provided* that such "a commitment" is otherwise in accord with international law. Whether all or part of the United States action violates international law is also a constitutional question. . . . [T]he bombing of North Viet Nam appears to be an unconstitutional use of Presidential authority as well as a violation of international law.¹¹¹

In this watered down form, Falk's somewhat monistic argument presents no independent grounds for unconstitutionality but depends in the first instance on the establishment of an international violation. And

109. The real force underlying the "obligation" argument is that United States actions with respect to Viet Nam have over a period of more than twelve years created substantial and very real expectations on the part of many Vietnamese and other Asians that the United States will assist in the defense of South Viet Nam. The SEATO Treaty was one such act both embodying and creating these expectations. SEATO grew out of the defeat of the French in the first Indo-China war, and historically has been intimately associated with the Viet Nam problem. See A. EDEN, *FULL CIRCLE* 148-49, 158-63 (1960).

110. Falk, *supra* note 77, at 1154. Professor Quincy Wright seems to substantially agree with Falk. "The issue seems unimportant in view of the broad Constitutional powers of the President to use armed force without Congressional support or declaration of war." Wright, *Legal Aspects of the Viet-Nam Situation*, 60 AM. J. INT'L L. 750, 763 (1966).

111. Falk, *supra* note 77, at 1155.

in postulating that international violation is a sufficient condition for constitutional violation the argument is erroneous. The international and constitutional consequences of exercise of the foreign relations power are not identical. The Supreme Court has held that Congress may constitutionally override valid treaties by later inconsistent legislation even though the later enactment would be a violation of international law.¹¹² These holdings are particularly relevant in light of the congressional authorization for executive use of the armed forces in Viet Nam, making such action in fact executive-congressional action.¹¹³ The Executive and Congress substantially exercise the foreign affairs power of the nation and it is not clear that they are *ever* acting *unconstitutionally* solely because of violation of international norms. And if there is any authority that such action is *necessarily* unconstitutional Professor Falk does not share it with us.

It is one thing to recognize that customary and treaty norms of international law are part of "the law of the land" under Article VI for the purpose of binding the states (which essentially have no independent foreign relations power), and quite another to argue, as Professor Falk must under his thesis, that this article constitutionally restricts the exercise of the foreign relations power of the United States. It may be that in some contexts or when dealing with some types of international norms Congress or the Executive should be so restricted, but Professor Falk offers no constitutional standards as to what those contexts are. Some major problems which would have to be explored before his thesis could be applied to Viet Nam, even assuming international violation, are: What is the constitutional effect of the congressional authorization of the use of armed forces in Viet Nam by the Southeast Asia Resolution and other congressional actions with respect to Viet Nam? How do the "political question" problems affect the impact of this thesis?¹¹⁴ And in what circumstances is it feasible or desirable to compel judicially changes in foreign policy because of an asserted violation of international law? As it stands, Professor Falk's

112. See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Whitney v. Robertson*, 124 U.S. 190 (1888); Dickinson, *The Law of Nations as National Law: "Political Questions,"* 104 U. PA. L. REV. 451, 487-90 (1956). For an illustration from Great Britain, see *Mortensen v. Peters*, 14 Scots L.T. 227 (1906).

113. For an analysis of the lawfulness of United States assistance to South Viet Nam under internal constitutional processes and a review of congressional action authorizing and affirming United States assistance, see Moore & Underwood, *The Lawfulness of United States Assistance to the Republic of Viet Nam*, 112 CONG. REC. 14,943, 14,960-67, 14,983-89 (daily ed. July 14, 1966).

114. See generally Dickinson, *supra* note 112.

constitutional argument is even more unpersuasive than the earlier "declaration of war" argument which he rejects.

Conclusion

The persistence of competing models of the Viet Nam conflict suggests that the conflict cannot be meaningfully generalized in black and white terms. Real-world Viet Nam is unalterably ambiguous, and writers on both sides do not perform a service when they assume a certainty and simplicity that does not exist. Although the conflict is not solely a product of "aggression from the North," the substantial interaction between Hanoi and the Viet Cong, the historical background of the conflict, and the objectives of Hanoi in supporting the sustained attack also belie meaningful characterization as civil strife. And Hanoi's unwillingness to negotiate mutual withdrawal from the South in the face of repeated United States declarations of willingness to promulgate a time table for withdrawal does not support a model which portrays Hanoi as merely concerned with offsetting United States assistance.

If because of Viet Nam Americans are asking themselves hard questions about the use of national power and the goals of foreign policy, the North Vietnamese must ask themselves hard questions about the use of force as an instrument of major international change. At some point it seems probable that this introspection will yield to a negotiated settlement. Neither side seems to have sufficient usable military and political power to win decisive victory short of a protracted struggle at great human and material cost. Secretary General U Thant is right both in perception and in emphasis when he terms the Viet Nam war basically a political problem that can only be solved by a political settlement. This, however, is a stricture that both sides must be willing to accept and to date the North Vietnamese have shown but flickers of interest in such a settlement. Despite this hard line from Hanoi, the United States must continue to emphasize a negotiated solution to the conflict and must energetically exploit any interest in negotiated settlement shown by participants in the opposing camp. A negotiated peace is the only alternative to a prolonged and increasingly dangerous conflict.

Emphasis on negotiated settlement should not obscure the fact that the conflict did not merely arise by accident, but that it reflects major differences in objectives of the contending participants and a value structure in Hanoi which exhibits greater willingness to achieve extension of its values by force. North Vietnamese disregard of this basic proscription against unilateral change by force is central to the conflict

in Viet Nam. At Potsdam Stalin promised that Korea would be divided only temporarily,¹¹⁵ but when temporary occupation of the north turned into permanent communization South Korea did not militarily attack across a major cold war dividing line despite United Nations support for a unified Korea. Such an attack from South Korea, like military assistance from North Viet Nam, could have been expected to trigger major conflict. The parallel, like all foreign affairs analogy, is not exact, but the contrast accurately points up a fundamental departure by North Viet Nam and those nations supporting it from the basic principle of the United Nations Charter outlawing war as an instrument of national policy. Acceptance by all nations of that fundamental requirement of minimum public order is a crucial first step toward a world community able to set aside its differences and get on with the real task of applying its immense resources to the alleviation of poverty, ignorance, and disease.

115. S. MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE 1065* (1965).